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Nos. 89-1452 and 89-1453

In the Supreme Court of the United States

OCTOBER TERM, 1990

MOBIL OIL EXPLORATION & PRODUCING SOUTHEAST, INC., ET AL., PETITIONERS

v.

UNITED DISTRIBUTION COMPANIES, ET AL.

FEDERAL ENERGY REGULATORY COMMISSION, PETITIONER

v.

UNITED DISTRIBUTION COMPANIES, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE RESPONDENTS

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QUESTION PRESENTED

Whether Orders No. 451 and No. 451-A of the Federal Energy Regulatory Commission, by creating a new pricing structure for old gas and in effect deregulating all prices, abandonments, and sales of such gas, violate the Natural Gas Policy Act of 1978 and the provisions of the Natural Gas Act of 1938 that remain applicable to the regulation of old gas.

PARTIES TO THE PROCEEDINGS

The parties to these consolidated cases are listed in appendices to the petitions for a writ of certiorari (89-1452 Pet. App. 76a-82a; 89-1453 Pet. App. 83a-86a) and in an appendix to respondents' brief in opposition (App. 1a-11a).

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STATUTORY PROVISIONS INVOLVED

The full text of Title I, subtitle A, of the Natural Gas Policy Act of 1978 ("Wellhead Pricing Controls"), which consists of Sections 101 through 110 of the statute, 15 U.S.C. §§ 3311-3320, as well as Sections 121, 503, and 601 of the Act, 15 U.S.C. §§ 3331, 3413, and 3431, are reproduced in Appendix A. Also reproduced in Appendix A is the text of Sections 4 and 7(c) of the Natural Gas Act of 1938, as amended, 15 U.S.C. § 717c and § 717f(c). Sections 5(a) and 7(b) of the Natural Gas Act, 15

U.S.C. § 717d(a) and 717f(b), appear in the appendix to the brief of the Federal Energy Regulatory Commission, at 1a-2a.

STATEMENT OF THE CASE

This case involves a challenge to two rulemaking orders issued by the Federal Energy Regulatory Commission ("Commission" or "FERC"), Order No. 451 (J.A. 5-205) and, on rehearing, Order No. 451-A (J.A. 206-436). These orders dramatically increase (by almost 700 percent in some instances) the ceiling prices for 15 categories, or "vintages," of "old" gas regulated under Sections 104 and 106 of the Natural Gas Policy Act ("NGPA").[1] (A table showing the enormous dollar and percentage increases in ceiling prices authorized by Order No. 451 is attached as Appendix B.) The orders also announce the Commission's decision to discontinue altogether its traditional regulation of the commencement and abandonment of old gas service under the Natural Gas Act ("NGA"), and instead to grant blanket authorizations in advance for any future abandonments and sales of old gas.

To place the current controversy in perspective and to describe the extent to which the NGPA changed the Commission's responsibilities and discretion for regulating the natural gas industry, a brief survey of the history of natural gas regulation under the NGA and NGPA is required.

A. The Natural Gas Act

Congress first exercised authority over the natural gas industry in 1938, with the passage of the NGA. *See* 15

[1] "Old" gas is natural gas that was committed or dedicated to the interstate market, and regulated under the Natural Gas Act, when Congress enacted the NGPA in 1978. By definition, old gas does not include gas flowing from newly drilled wells. Old gas is produced from wells drilled before the NGPA, in some instances forty or fifty years ago. As a rule, the production costs for old gas are considerably lower than the costs incurred in producing gas from newer wells.

U.S.C. §§ 717-717w. Through the NGA, Congress imposed comprehensive federal regulation over wholesale sales and transportation of natural gas in interstate commerce. *FPC v. Louisiana Power & Light Co.*, 406 U.S. 621 (1972). The statute's goal, as often recognized by the Court, was to afford consumers "a complete, permanent and effective bond of protection from excessive rates and charges" and to "assure the public a reliable supply of gas at reasonable prices . . . ." *Atlantic Refining Co. v. Public Service Commission*, 360 U.S. 378, 388 (1959); *United Gas Pipe Line Co. v. McCombs*, 442 U.S. 529, 536 (1979); *accord, California v. Southland Royalty Co.*, 436 U.S. 519, 523 (1978).

Through the NGA, Congress delegated to the Federal Power Commission (FERC's predecessor agency) broad federal authority over the commencement and abandonment of interstate natural gas sales and transportation services. *See* 15 U.S.C. § 717f(b) and (c). Congress also delegated to the Commission exclusive "'utility-type ratemaking' control over prices and supplies" of interstate natural gas. *Transcontinental Gas Pipe Line Corp. v. State Oil & Gas Board*, 474 U.S. 409, 420 (1986) (hereafter "*Transco*"). This latter authority is contained in Sections 4 and 5 of the NGA, which provide that all rates "shall be just and reasonable . . . ." 15 U.S.C. §§ 717c(a) and 717d.

Under Sections 4(c) and (d) of the NGA, natural gas companies, such as producers selling old gas in interstate commerce, must file any rates or changes in rates and any contracts relating thereto with the Commission. Any such rates, rate changes, or contracts must be kept open for public inspection. 15 U.S.C. § 717c(c) and (d). The Commission is empowered, either in response to a complaint or on its own initiative, to conduct a public hearing on the justness and reasonableness of any rate or rate change. 15 U.S.C. § 717c(e); *see also* 15 U.S.C. § 717d. If the Commission finds, after such a hearing, that any rate is "unjust, unreasonable, unduly discriminatory, or preferential," the Commission must "deter-

mine the just and reasonable rate" and "fix the same by order . . . ." 15 U.S.C. § 717d(a).

Soon after this Court's decision in *Phillips Petroleum Co. v. Wisconsin*, 347 U.S. 672 (1954), which required the Commission to regulate prices charged at the wellhead for gas dedicated to the interstate market, the Commission sought to relieve itself of the burden of setting prices for each producer individually, and therefore adopted a so-called "area rate" approach to gas pricing. That approach was sustained by this Court in *Permian Basin Area Rate Cases*, 390 U.S. 747 (1968) (hereafter "*Permian Basin*"). Later, the Commission switched to a "national rate" approach, and that too was upheld. *Shell Oil Co. v. FPC*, 520 F.2d 1061, 1073-1074 (5th Cir. 1975), *cert. denied*. 426 U.S. 941 (1976). As a key component of both area and national ratemaking, the Commission required some form of "vintaging" of natural gas. Under vintaging, producers receive lower prices for gas already flowing (*i.e.*, "old" gas) and higher prices for new gas, *i.e.*, gas produced from newly drilled wells. Vintage pricing is based on the assumption that, for old gas, "price could not serve as an incentive, and . . . any price above average historical costs, plus an appropriate return, would merely confer windfalls." *Permian Basin*, 390 U.S. at 797.

In December 1974, after the Commission had been using vintaging for more than a decade, the Commission decided to eliminate the practice gradually, as existing contracts for the sale of natural gas in interstate commerce expired. *See Shell Oil Co. v. FPC*, *supra*, 520 F.2d at 1077-1078. The Commission took this step as a way of attempting to address emerging shortages of supply dedicated to the interstate market. The experiment was quickly abandoned, however, and the practice restored, even though supply shortages to the interstate market had become more acute. Vintaging was essential, the Commission said, "to preclude exaction of excessive and unjustifiable economic rent from flowing gas." Opinion No. 770, *National Rates for Natural Gas*, 56 F.P.C. 509, 521 (1976), and Opinion No. 770-A, issued on rehearing, *National Rates for Jurisdictional Sales of Natural Gas*, 56 F.P.C. 2698, 2780 (1976) ("In light of the demonstrable cost differentials associated with various vintages of gas and the impact on the public of permitting the price of all gas to eventually rise to a uniform national rate based on most recent costs . . ., we cannot continue our former policy of eliminating vintaging"), *aff'd*, *American Public Gas Association v. FPC*, 567 F.2d 1016, 1033 (D.C. Cir. 1977), *cert. denied*, 435 U.S. 907 (1978).

By the time Congress enacted the NGPA, the Commission had fully returned to its vintaging policy as an indispensable means of protecting consumers by prohibiting economic windfalls to producers of old gas, and that policy was incorporated into the NGPA itself. *See* Sections 104(a) and (b), 15 U.S.C. §§ 3314(a) and (b). Never until Order No. 451 did the Commission authorize the complete and immediate elimination of all price vintaging of old natural gas.

B. The Natural Gas Policy Act of 1978

Rate regulation under the NGA applied only to the interstate market. By the 1970's, gas producers could obtain significantly higher prices in the unregulated intrastate markets, and shortages therefore developed in the interstate market. In response to this situation, Congress enacted the NGPA, which "has been justly described as a 'comprehensive statute to govern future natural gas regulation.'" *Public Service Commission v. Mid-Louisiana Gas Co.*, 463 U.S. 319, 332 (1983) (hereafter "*Mid-Louisiana*"), quoting Note, *Legislative History of the Natural Gas Policy Act*, 59 Texas L. Rev. 101, 116 (1980); *see also Transco*, 474 U.S. at 420. The NGPA was the product of two conflicting legislative approaches. In the Court's words, "the Senate passed a bill deregulating interstate gas, the House passed a bill extending federal regulation to intrastate gas, [and t]he Conference Committee struck a compromise." *FERC* v. *Martin Ex-*

ploration Management Co., 486 U.S. 204, 207 (1988) (citations omitted) (hereafter "*Martin Exploration*").

At the heart of the compromise was "an exhaustive categorization of natural gas production." *Mid-Louisiana*, 463 U.S. at 332. In extensive and intricate detail, Congress established several categories and subcategories of old gas (Sections 104 and 106), new gas (Sections 102 and 103), gas sold under existing intrastate contracts (Section 105), and difficult-to-produce gas (Sections 107 ("high-cost" gas) and 108 ("stripper well" gas)). In addition, to avoid any gaps in coverage, Congress created, in Section 109, a catch-all category covering "any natural gas which is not covered by any maximum lawful price under any other section" of the statute. *Id.* at 332-333.

Congress then assigned specific price ceilings to all of the categories of gas identified in the statute, and it also provided for automatic increases in these ceilings to keep pace with inflation. Congress assigned the highest price ceilings to difficult-to-produce gas and the next highest ceilings to new gas. These ceilings were considerably higher than any of the "just and reasonable" rates that the Commission had previously established under the NGA. Congress assigned the lowest ceilings to old gas; it simply enacted into law, for each vintage of old gas, the rates previously set by the Commission under the NGA, adjusted for inflation. *See Energy Reserves Group, Inc. v. Kansas Power & Light Co.*, 459 U.S. 400, 417 n.24 (1983) ("Old interstate gas is subject to the much lower ceilings of § 104, or § 106"). The NGPA thus "directly incorporates part of the 'vintaging' pattern that previously existed under the NGA." *Mid-Louisiana*, 463 U.S. at 334.[2]

Congress had a clear purpose in prescribing a "tiered" approach to the pricing of old, new, and difficult-to-produce

[2] For the catch-all category of natural gas established in Section 109, Congress fixed the initial ceiling price at the same level as the highest ceiling price applicable to an old gas vintage. *See* 15 U.S.C. § 3319(b)(1)(A). This was the ceiling price for the most recent vintage of old gas, gas produced from wells drilled in 1975 through early 1977.

natural gas. It intended to provide incentives for the development of new and difficult-to-produce gas, because that development would increase the Nation's natural gas resource base. For old gas, Congress recognized that such incentives were not necessary, because old gas, by definition, was already available to the market. Congress therefore withheld any additional incentives from old gas, unless it otherwise qualified under an incentive-priced category. *Mid-Louisiana*, 463 U.S. at 334-335, 342.

As the Commission explained in its brief to this Court in the *Mid-Louisiana* case, "no incentive [was] required" for old gas because the gas already "flowed in interstate commerce prior to enactment of the NGPA . . . ." Brief for Federal Energy Regulatory Commission 31 n.33 (Nos. 81-1889 *et al.*). *See also Pennzoil Co. v. FERC*, 645 F.2d 360, 367 (5th Cir. 1981), *cert. denied*, 454 U.S. 1142 (1982) ("the NGPA provided consumer protection by maintaining lower prices on flowing gas"). Indeed, in Order No. 451 itself, the Commission recognized that "Congress considered this provision for old gas prices to be a significant feature of the NGPA's design, intended to mitigate the effects on consumers of allowing higher prices for new gas." J.A. 219.

In addition to the incentives provided in the NGPA for new gas and various explicitly identified categories of difficult-to-produce gas, Congress also authorized the Commission to establish special incentives for *any* natural gas produced under conditions that the Commission "determines to present extraordinary risks or costs." *See* Sections 107(b) and (c)(5), 15 U.S.C. §§ 3317(b) and (c)(5). Congress allowed such special incentives only to the extent "necessary" to stimulate production.

The only other NGPA provisions allowing the Commission to establish price ceilings different from those prescribed by Congress were Sections 104(b)(2), 106(c), and 109(b)(2). The provisions applied only to old gas and to the NGPA's catch-all category of gas that did not fit under any of the other statutory classifications. These

withhold new production incentives. Congress limited the were the very categories for which Congress decided to price ceiling increases permissible under these provisions to those shown to be "just and reasonable within the meaning of the Natural Gas Act." [3]

As the final part of the legislative compromise reflected in the NGPA, Congress specifically delineated those categories of gas that were to be deregulated at specified times in the future, through the elimination of price ceilings. The relevant NGPA provision is Section 121, 15 U.S.C. § 3331. It demonstrates that when Congress wanted to deregulate certain categories of natural gas, it did so directly. Under Section 121, "the price ceilings for certain 'high-cost' gas were eliminated in 1979, for certain 'old' intrastate gas and 'new' gas in 1985, and for certain other 'new' gas in 1987." *Martin Exploration*, 486 U.S. at 207. Old interstate gas (*i.e.*, the kind of gas that is subject to the price ceilings of Section 104 and 106) is *not* included among the categories of gas that Congress chose to deregulate.

C. The Commission's Prior Interpretations of the NGPA

Before its adoption of the Orders at issue in this case, the Commission had several opportunities to interpret and apply the NGPA and to construe Sections 104(b)(2) and 106(c). Much of what the Commission said and did at the time of the NGPA's enactment and in the years immediately thereafter demonstrates that the Commission believed: (i) that Congress chose in the NGPA not to provide new incentives for the production of old gas; and (ii) that the rate-setting provisions in Sections

[3] For old gas, "just and reasonable" prices under the NGA primarily reflected prices based on actual costs, using test year data, with some allowance for future exploration costs. *See, e.g.*, Opinion No. 749, *Just and Reasonable National Rates for Sales of Natural Gas*, 54 FPC 3090 (1975), *aff'd Tenneco Oil Co. v. FERC*, 571 F.2d 834, 840 (5th Cir.), *cert. dismissed*, 439 U.S. 801 (1978) ("The 'zone of reasonableness' is wide. The producers, under the Constitution as well as the [NGA], are, at bottom, only entitled to a fair return on their actual costs").

104(b)(2) and 106(c) were limited "special relief" provisions, which were not intended to empower the Commission to adopt across-the-board, incentive price ceilings for old gas.

1. *The Curtis/Jackson letter and the accompanying FERC analysis of the NGPA*

As congressional consideration of the NGPA was drawing to a close, several members of the Senate Committee on Energy and Natural Resources requested that the Chairman of the Commission prepare an analysis of the final conference committee report, and comment on the proposed legislation. Chairman Curtis responded in a letter to Senator Jackson, the Chairman of the Senate Committee. With the letter, Chairman Curtis submitted the Commission's analysis of the conference bill. *See* Letter of Charles B. Curtis, FERC Chairman, to Senator Henry M. Jackson (Sept. 8, 1978), relevant portions reproduced in *Natural Gas Policy Act Information Service*, Vol. 1, ¶¶ 21-25, Federal Programs Advisory Service (1980).

At the outset, the Commission observed that the NGPA is "unusually detailed," and that this detail "gives greater definition of Congressional intent than is generally the case . . . ." *Id.* ¶ 22, at 1. The Commission further stated (*id.*) that this greater level of detail created

> advantages of regulatory certainty which are derived from a full and detailed exposition of the requirements of the law rather than leaving such matters to implementing regulations of an administrative agency acting under a broad grant of delegated authority.

With respect to the authority conferred by Sections 104(b)(2) and 106(c) of the NGPA, the Commission's comments plainly contemplated that that authority would be exercised in response to applications from individual producers for relief from the statutory price ceilings, not as a means of drastically revising the overall pricing structure established by Congress (*id.* at 4-5):

Except in instances where the Commission receives applications for rates in excess of the maximum lawful prices under the NGPA (in which case it may establish a higher rate if it meets just and reasonable standards), the Commission will no longer inquire into producer costs nor establish permissible rates of return. Instead, the focus of the inquiry will be on whether geological information, production histories, field records, prior contractual agreements, and the like, evidence eligibility for the statutory rates permitted for different classifications of production.

2. *The Commission's Order No. 23: The interaction of the NGPA and contractual price escalator clauses*

In Order No. 23, issued less than five months after the NGPA became law, the Commission considered the applicability of contractual price escalator clauses to the new price ceilings set by the statute. 44 Fed. Reg. 16,895 (Mar. 20, 1979). A typical price escalator clause provides "that if a governmental authority fixes a price for any natural gas that is higher than the price specified in the contract, the contract price shall be increased to that level." *Energy Reserves Group, Inc. v. Kansas Power & Light Co., supra,* 459 U.S. at 403. As the Commission acknowledged in Order No. 451-A, a very substantial majority (approximately 90 percent) of all contracts for the sale of old gas contain such clauses. J.A. 310.

The question addressed in Order No. 23 was whether price escalator clauses should be construed to permit the immediate collection of the new ceiling prices set by the NGPA. The Commission concluded that it would not interpose any general objection to such escalations, and its position was sustained in *Pennzoil Co. v. FERC,* 645 F.2d 360 (1981), *cert. denied,* 454 U.S. 1142 (1982).

The Commission remarked that permitting price escalator clauses to be triggered by the NGPA price ceilings was "particularly appropriate" in the context of the old gas ceiling prices established under Sections 104 and 106(a) of the NGPA. This was because, unlike the incentive ceiling prices established in the NGPA for new

and difficult-to-produce gas, the old gas ceilings were "based [on] and inextricably linked to previously prescribed FPC rates"—rates that had already been collected under the NGA, often pursuant to the very escalator clauses that the Commission considered in Order No. 23. 44 Fed. Reg. at 16,903.

In the course of its discussion in Order No. 23, the Commission, speaking in the specific context of old gas pricing, explicitly recognized that the NGPA imposed limits on the Commission's prerogatives:

> The system of legislating prescribed maximum ceiling prices replaces in large measure both the Commission's authority and its responsibility to establish just and reasonable rates applicable to producer sales in interstate commerce.

44 Fed. Reg. at 16,897. The Commission further explained that "[w]hat the Congress did in enacting Section 104 was to freeze as of April 20, 1977 the presently lawful FPC rates and to change the escalation factors from those established by the FPC to a different method required by the Congress." *Id.* at 16,903.

3. *The Commission's proposed rulemaking under Section 104 and Section 106: Procedures governing applications for special relief*

Less than a year after the NGPA was passed, the Commission turned its attention specifically to the Commission's authority under Sections 104(b)(2) and 106(c) to increase ceiling prices for old gas. *Procedures Governing Applications for Special Relief Under Sections 104, 106 and 109 of the Natural Gas Policy Act,* Notice of Proposed Rulemaking, 44 Fed. Reg. 49,468 (Aug. 23, 1979). As the title of the Commission's notice suggests, the Commission interpreted its authority under Sections 104(b)(2) and 106(c) to apply to particular situations in which the existing ceiling price was "too *low*" to enable a particular producer to recover its costs. *See Mid-Louisiana,* 463 U.S. at 333 (emphasis in original).

Neither in its original notice of rulemaking, nor in its two subsequent requests for further comments, nor in its eventual termination of the rulemaking proceeding did the Commission suggest that its authority under Sections 104(b)(2) and 106(c) could be used to create new incentive prices for *all* flowing old gas or to restructure the pricing policies of the NGPA. *See* 45 Fed. Reg. 5,321 (Jan. 23, 1980); 45 Fed. Reg. 31,744 (May 14, 1980); 49 Fed. Reg. 21,910 (May 23, 1984). Rather, the Commission proceeded on the assumption that special relief rates under Sections 104 and 106 must not be so high as to create a windfall for producers. *See* 45 Fed. Reg. at 5,323 (citing *Public Service Commission v. FERC*, 589 F.2d 542 (D.C. Cir. 1978)). And the Commission made it clear that, if a producer of old gas desired an incentive price, it would have to proceed under some section of the NGPA other than Sections 104(b)(2) or 106(c). *Id.* at 5,321.

The proposed regulations were withdrawn and the rulemaking proceedings terminated in 1984, when the Commission concluded that it would implement its authority under Sections 104 and 106 on a case-by-case basis. *See* 49 Fed. Reg. 21,910 (May 23, 1984). The Commission determined that the existing gas surplus, combined with producers' ability to obtain higher ceiling prices under *other* sections of the NGPA, removed the need for industry-wide standards for "special relief."

In withdrawing the proposed regulations, the Commission gave a clear indication of its understanding of the scope of its authority under Sections 104(b)(2) and 106(c). The Commission explained that "[w]hen Congress enacted the NGPA in 1978, it provided a link between the NGA's special relief procedures and the NGPA in sections 104(b)(2), 106(c), and 109(b)(2)." 49 Fed. Reg. at 21,910. The Commission further explained that "[u]nder the NGA, special relief was a 'safety valve' for area or national rates that might otherwise have been confiscatory." *Id.* at 21,912; *see also Permian Basin*, 390 U.S. at 770-774. While the Commission said that it

"will continue to use special relief as a 'safety valve' in those situations where the maximum lawful price under Sections 104 or 106(a) does not allow a producer to recoup costs," it concluded that it should not use this statutory authority to grant the same kind of incentive prices that were available elsewhere.[4]

4. *The Commission's Order No. 72 and the producers' proposal to circumvent Sections 104 and 106*

Shortly after the NGPA was enacted, producers of old gas (including many of the producers that are petitioners here) proposed a plan that would have permitted them to apply to all vintages of old gas the ceiling price for the most recent vintage. As explained above, this was the highest ceiling for any of the vintages and the same ceiling that the Commission later adopted for all old gas in Order No. 451.

The producers' proposal was simply to drill new wells in fields that were already producing old gas. Their theory was that new wells placed right alongside wells producing old gas would not fit within any of the existing vintages, and therefore would fall within the catch-all category of Section 109. This, the producers said, would entitle them to the Section 109 ceiling, which, as mentioned above (*see* note 2, *supra*), was equal to the ceiling for the most recent vintage of old gas. Through the expedient of drilling unnecessary new wells to pro-

[4] In its case-by-case review of special relief applications under Sections 104(b)(2) and 106(c), the Commission required a producer to carry the burden of demonstrating that the existing vintaged ceiling price had become confiscatory in the producer's individual circumstances. *See, e.g., Phillips Petroleum Co.*, 32 F.E.R.C. ¶ 61,463, at 62,060 (1985) ("Special relief is justified only in exceptional or extraordinary cases in which the producer demonstrates that its existing rates do not permit recoupment of costs"); *A.O. Phillips Estate*, 27 F.E.R.C. ¶ 61,377, at 61,728 (1984) ("special relief was to act as a 'safety valve' for producers for whom gas sales at the applicable area rates might amount to an unconstitutional taking of private property without due process"). The Commission seldom found special relief to be justified under this standard.

duce the very gas already being produced by existing wells, the producers hoped to escape the price restraints of Sections 104 and 106.

The Commission rejected the producers' stratagem, calling it "a regulatory alchemy." Order No. 72, 45 Fed. Reg. 18,915, 18,917 (Mar. 24, 1980). The Commission reasoned that "[u]nquestionably, a fundamental purpose of the incentive prices of Title I of NGPA was to encourage investment in the exploration and development of *new* natural gas reserves." *Id.* (emphasis added). Congress did not intend, however, "to induce capital investment and the use of limited resources for the production of supplies of natural gas which are already available." *Id.*

Moreover, the Commission continued, the attempt to circumvent the price limitations on old gas simply by drilling new wells could nullify Sections 104 and 106 entirely. "A reading of section 109 which has the potential to make sections 104, 105 and 106 inapplicable to flowing natural gas is neither reasonable nor consistent with the pricing scheme of the NGPA." *Id.* at 18,918. The Fifth Circuit affirmed this interpretation. *See ECEE, Inc. v. FERC*, 645 F.2d 339, 357-360 (5th Cir. 1981).

Thus, in Order No. 72, the Commission rejected a ceiling price for old gas, equal to that established in Order No. 451, as being contrary to the "pricing scheme of the NGPA." And the Commission also acknowledged that Congress did not intend to provide additional production incentives for old gas, which is precisely what the Commission would later allow in Order No. 451.

5. *The Commission's Orders No. 107 and No. 107-A: The applicability of Section 107(c)(5) price incentives to old gas*

The Commission has twice considered the question whether it should authorize an incentive price under Section 107(c)(5) for the production of old gas through the use of production enhancement techniques. Section 107(c)(5) empowers the Commission to provide an incentive

for production that presents "extraordinary risks or costs." Initially, the Commission concluded that old gas covered by Sections 104 and 106 should not be eligible for such incentive prices at all. *High-Cost Natural Gas: Production Enhancement Procedures*, Order No. 107, 45 Fed. Reg. 77,421 (Nov. 24, 1980). The Commission explained that "Congress has provided special repricing mechanisms" for old gas in Sections 104(b)(2) and 106(c), and that the Commission had begun a rulemaking proceeding to establish "substantive and procedural guidelines for granting 'special relief' " under these sections. *Id.* at 77,422 nn.8, 11.

Three years later, on rehearing, the Commission reversed its position and granted a "production enhancement incentive price" under Section 107(c)(5) to old gas, if it could qualify for that price under the Commission's production enhancement rule. Order No. 107-A, 48 Fed. Reg. 45,097 (Oct. 3, 1983).[5] The Commission stressed that "not all production enhancement work on interstate wells involves extraordinary costs or requires incentive prices for production." *Id.* at 45,100. The production enhancement rule therefore prescribed very specific "substantive qualification standards and procedural safeguards" to ensure that the incentive price would be granted *only* to "that gas for which it is 'necessary' to provide a 'reasonable' incentive." *Id.*[6]

[5] As this Court stated in *Mid-Louisiana*, 463 U.S. at 335, "old gas that would be subject to the old NGA vintaging rules may be entitled to a higher rate if it falls within one or more of the other Title I categories, in particular § 107 (high-cost natural gas) and § 108 (stripper well gas)."

[6] Among other things, the rule required that producers seeking a Section 107(c)(5) incentive price identify *in advance* the specific production enhancement work they proposed to perform and that they then *actually perform* that work once the incentive price was granted.

Even with this requirement that the producer *actually incur* the costs associated with the additional work, the rule limited the incentive price available under Section 107(c)(5) to the Section 109 ceiling price. That is, the *maximum* incentive available under Sec-

The detailed and demanding limitations that the Commission imposed in its production enhancement rule are noteworthy because the Commission there was exercising its authority under Section 107, a provision undisputedly designed to provide incentive prices. Even so, the Commission took pains to avoid granting any across-the-board incentives, and to confine incentive prices only to "reasonable" levels and only to those situations where such prices were "necessary" for a particular producer and particular well. Section 107(b), 15 U.S.C. 3317(b).

The Commission expressly distinguished the "special relief" authorized by Sections 104(b)(2) and 106(c) from the incentive prices authorized by Section 107:

> [S]pecial relief procedures serve a different function than the incentive pricing program. Special relief procedures as they have been traditionally interpreted are intended to provide economic relief after the fact, that is, after the producer undertook to develop and produce gas . . . . [T]he section 107 incentive price was intended to provide an incentive *in advance* of drilling activity to encourage production where it may not have been economically feasible.

48 Fed. Reg. at 45,101 (emphasis in original).[7]

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tion 107 for old gas that qualified under the production enhancement rule was the same as the ceiling later adopted for all old gas in Order No. 451.

The rule also provided a separate formula to guarantee that under no circumstances would the Section 107(c)(5) incentive permit the price of incremental gas production to rise above twice the ceiling price for new gas under Section 103. *See* 18 C.F.R. § 271.704(c)(1)(B)(2)(v).

In addition, the rule required (i) that the producer submit its own sworn affidavit and an affidavit from its pipeline purchaser stating that the incentive price was necessary to enhance production of old gas; and (ii) that the appropriate jurisdictional agency find "that there is a reasonable basis to conclude that the price is necessary as a reasonable incentive and that the production enhancement would not be performed but for the price." 48 Fed. Reg. at 45,100.

[7] Without citation, the Commission asserted in a footnote that its authority under Sections 104(b)(2) and 106(c) may extend

6. *The Commission's block billing proposal*

Several months before the Commission initiated the rulemaking proceedings that led to Order No. 451, it proposed, and requested public comment on, a new pipeline rate design mechanism that it called the "block billing" rule. *Regulation of Natural Gas Pipelines After Partial Wellhead Decontrol*, Notice of Proposed Rulemaking, 50 Fed. Reg. 24,130 (June 7, 1985).

As proposed, the block billing rule would require interstate pipelines to segregate their "old" and "new" natural gas supplies into two blocks, thereby ending the standard pipeline practice of "rolling in" or "averaging" the costs of all gas supplies purchased by the pipeline. After such "blocking," traditional pipeline customers, *i.e.*, local distribution companies that serve residential, commercial, and industrial consumers, would be authorized to purchase the pipeline's "block 1" old gas. Non-traditional pipeline customers, such as large industrial end users, would be authorized to purchase the pipeline's "block 2" new gas.

The stated objective of the block billing rule was to provide clearer pricing signals so that customers would not be misled by average prices that included both new gas and lower-priced old gas. 50 Fed. Reg. at 24,139. In explaining its initial proposal, the Commission recognized that the "vintaged" price of old gas was below the market price, and it stressed that the savings associated with the purchase of this gas (which the Commission called "economic rents") were to be "preserved for" and made available to consumers and other traditional pipeline customers, *"as Congress apparently intended."* *Id.* at 24,138 (emphasis added).

"much further" than the special relief proposals then under consideration in the rulemaking described at pages 11-13, *supra*. 48 Fed. Reg. at 45,101 n.14. But the Commission never suggested that Sections 104(b)(2) and 106(c) could be used to provide new incentive prices for old gas, much less across-the-board new incentives that would completely revise the pricing structure of the NGPA.

Thereafter, approximately two months before the Commission initiated the Order No. 451 rulemaking, it requested supplemental comments on its block billing proposal. Notice Requesting Supplemental Comments, 50 Fed. Reg. 42,372 (Oct. 18, 1985). In this Notice, the Commission left no doubt about its interpretation of the role that Congress intended old gas to play in the natural gas market. The Commission said:

> [B]lock 1 gas [*i.e.*, old gas] is *not market responsive specifically by legislative intent.* Thus, . . . the categories of gas in block 1 should not be allowed to distort marginal decisions by consumers and producers. Block 2 [*i.e.*, new gas], by contrast, is gas whose price has been decontrolled or which is subject to NGPA regulation that intended prices to be market responsive.

Id. at 42,376 (emphasis added). Thus, on the eve of the appearance of Order No. 451, the Commission itself expressly admitted that under the NGPA old gas was not intended to be "market responsive." [8]

D. The Immediate Background of Order No. 451

Although the NGPA succeeded in encouraging the development of new gas supplies and in reducing the disparity between the interstate and intrastate markets, other problems soon arose. Natural gas prices remained high, largely because many purchasers, in response to earlier gas shortages, entered into high-price "take-or-pay" contracts that guaranteed a specified volume of gas but obligated the purchaser to pay for that volume at the contract price, even if the purchaser could not take the gas. *See* Pet. App. 29a; *Transco*, 474 U.S. at 412. At the same time, projected demand did not materialize

[8] In Order No. 451, the Commission stated that "the block billing and [Order No. 451] proposals are to a large extent mutually exclusive and . . . it is questionable whether they could be combined or if so what the likely consequences would be." J.A. 169-170. Nevertheless, the Commission decided not to terminate its block billing proposal, but to "review the matter in light of the operation of [Order No. 451] in actual practice . . . ." *Id.* at 170. The block billing rule is still pending before the Commission.

due to a sharp decline in the price of oil and other competing fuels, an economic recession, improved energy conservation, and other causes. These factors led to an imbalance between the available supply and market demand for natural gas, which in turn reduced incentives for exploration and new development. *See* Pet. App. 8a-9a; J.A. 33-34; *Maryland People's Counsel v. FERC*, 761 F.2d 768, 770-771 (D.C. Cir. 1985).

Throughout this period, the Commission and the Department of Energy ("DOE") grew increasingly dissatisfied with the congressional pricing policies embodied in the NGPA. In 1981, for example, the Chairman of the Commission testified before a Senate Committee that "the most serious deficiency" of the NGPA was the "establishment of a new *dual market*, that is, one in which some gas prices are regulated while others are not." J.A. 35 n.59 (emphasis in original). In 1982, the Commission issued a Notice of Inquiry proposing to increase old gas prices, but abandoned the effort because of congressional opposition. Pet. App. 9a-10a. Then, in July 1984 and January 1985, DOE filed with Congress two reports on the natural gas market, as required by Section 123 of NGPA, 15 U.S.C. § 3333.[9] DOE urged Congress to remove price controls on old gas, and comprehensively to deregulate wellhead gas sales. Congress took no action in response to DOE's requests.

Having failed to convince Congress that the NGPA's pricing structure should be changed, the Commission, in response to a rulemaking proposal formulated by DOE, decided to act on its own.

E. Orders No. 451 and No. 451-A

1. *Deregulation of old gas prices*

In issuing Orders No. 451 and No. 451-A, the Commission essentially deregulated old gas prices. The Com-

[9] *See The First Report Required by Section 123 of the Natural Gas Policy Act of 1978* (July 1984); "Increasing Competition in the Natural Gas Market," *The Second Report Required by Section 123 of the Natural Gas Policy Act of 1978* (January 1985).

mission intended for those prices to be set by the market and no longer to be controlled or affected by the NGPA ceilings. The Commission itself admitted as much. The "fundamental purpose of the rule," the Commission said, "is to assure that old gas prices will more accurately reflect market clearing prices . . . ." J.A. 285.

To achieve this goal, the Commission first collapsed all of the ceiling prices applicable to the different vintages of flowing old gas that Congress preserved in Sections 104 and 106 of the NGPA into a single new vintage. J.A. 42-45. It then decreed that the new ceiling price for all old gas would be the *highest* ceiling price then in effect for any of the old gas vintages under Section 104. *Id.* at 42-45, 233.

This price, which was the ceiling price for the *newest* vintage of old gas, had been established initially by the Commission, prior to the NGPA, as a "new gas" price for wells drilled after 1974. *See* Opinion No. 770, *National Rates for Natural Gas*, 56 F.P.C. 509 (1976). The price was based on replacement costs, not historical costs, and thus was intended to be an incentive rate for the exploration and development of new gas reserves.

In recognition of this fact, Congress, in the NGPA, adopted the highest old gas ceiling price as the ceiling price for the catch-all category created by Section 109, and the Commission adopted the same ceiling as the maximum incentive price that would be allowed for qualified production enhancement gas produced under conditions of extraordinary risk or cost under Section 107(c)(5). By adopting this same ceiling in Order No. 451, the Commission in a single stroke gave *all old gas* the same incentive price that had previously been available *only* in exceptional cases, after compliance with the stringent requirements of the Commission's production enhancement rule.

The Commission attempted to justify the enormous increase in the old gas ceilings by claiming that higher prices were necessary to give producers an incentive not to abandon old gas wells prematurely. J.A. 24, 54, 95-96.

The Commission reached this conclusion even though the orders did not identify a single producer who had abandoned or was about to abandon old gas production because of the vintage pricing system, and even though, under Section 7(b) of the NGA, no producer was permitted to abandon an old gas well without the Commission's express prior approval. The Commission itself predicted that the majority of abandonment decisions would not even be made until after 1990. J.A. 260.

The Commission also failed to explain why higher prices for *all* flowing gas and the consequent wholesale revision of the NGPA pricing structure were necessary to achieve its goal. As numerous parties before the Commission observed, regulations and procedures already in effect would have allowed the Commission to induce additional old gas production at much less cost to consumers. In short, the Commission could have stimulated old gas production and at the same time protected consumers by "targeting" increased prices only to those old gas wells that producers otherwise might have sought to abandon prematurely. *See* Pet. App. 16a n.21. The Commission did not respond to the comments that made this point.

Moreover, notwithstanding its decision to authorize producers to receive higher prices for old gas, the Commission set no conditions of eligibility, as it had done in its Section 107(c)(5) rulemaking, to ensure that the producers' economic gains would actually lead to increased production. Instead, the Commission simply made the new incentive available to *all* old gas, regardless of whether *any* additional gas would be produced and regardless of whether any production enhancement work would be performed.

Because approximately 90 percent of old gas was sold under contracts containing escalator clauses (J.A. 310), most producers would have been entitled immediately to collect any new rate that the Commission determined was just and reasonable. This is what happened routinely as a result of the Commission's NGA ratemaking before the NGPA was enacted, and it is what continued to happen

routinely under the NGPA as the old gas price ceilings adopted by Congress were increased monthly by the statutory inflation adjustment factor. The applicable price ceilings were regularly collected.

The new Order No. 451 price ceiling, however, was different. The Commission said that actual collection of the new price would cause "the ceiling price [to] become a floor and that would distort the market as much as current artificially low ceiling prices." J.A. 141. *See also id.* at 310 (automatic collection of the ceiling price "would not be a just and reasonable result in the sense of providing for the lowest reasonable rate under MGA [*sic*] Section 5(a)"); *id.* at 141 (producers with escalator clauses "should not automatically receive the new ceiling price").

This was an astonishing concession. Although the Commission repeatedly declared that the new ceiling was just and reasonable (*see, e.g.*, J.A. 95), it simultaneously ruled that it would be *unjust* and *unreasonable* if natural gas producers were actually to receive the new ceiling price, as they ordinarily would have, through the operation of price escalator clauses. J.A. 141, 311 n.174. By its own admission, therefore, the Commission failed to set a price the collection of which would be just and reasonable.

The Commission attempted to correct this fundamental flaw by engrafting onto its new pricing scheme the so-called "good faith negotiation" ("GFN") procedure. The stated purpose of the GFN procedure was to avoid collection of the Commission's new, assertedly "just and reasonable" ceiling price and to allow parties to establish prices for old gas through private negotiations. J.A. 141-142, 310, 311 n.174.

The Commission characterized the GFN procedure as "an integral part of the new ceiling price itself . . . ." J.A. 43-44. As is apparent on the face of the GFN rules, however, and as the court of appeals correctly found (Pet. App. 31a-32a), the so-called "negotiation" procedure is in fact extremely one-sided and has given producers an unfair advantage. The GFN procedure cannot possibly achieve its stated goal of protecting purchasers against the Order No. 451 ceiling price.

To further its new policy of establishing "regulated" rates through private "negotiations," the Commission took additional steps to free producers of old gas from all other statutory requirements applicable to the rate-setting process. For example, under Section 4(b) of the NGA, 15 U.S.C. § 717c(b), a newly negotiated rate for old gas that differs from the previously filed rate cannot become effective unless the producer first submits a filing to the Commission. *See Maislin Industries, U.S. v. Primary Steel*, 110 S. Ct. 2759 (1990); *Arkansas Louisiana Gas Co. v. Hall*, 453 U.S. 571 (1981). In Order No. 451, however, the Commission waived all such rate filing requirements for all old gas that, as a result of the GFN procedure, is sold to new purchasers. J.A. 46, 164. This allows producers to negotiate rates different from the filed rate without submitting those rates to the Commission for its approval and without observing the public notice requirement applicable to new rates. Producers can thus avoid facing any regulatory constraint in collection of the "negotiated" rate. Order No. 451, therefore, put producers of "regulated" old gas in essentially the same shoes as producers of deregulated new gas.

2. *The GFN process—The Commission's removal of all regulation from old gas*

The GFN process essentially consists of three steps. Step One gives the producer the sole right to initiate the process. The producer does so by simply requesting the purchasing pipeline to nominate a new price for old gas that the producer chooses to place into the negotiating process. J.A. 46, 296; 18 C.F.R. § 270.201(b)(1)(i). In Step Two, the pipeline responds to the producer's request. If the pipeline nominates the new, "market-distorting" ceiling price, then the producer must honor its sales contract and continue service. If, on the other hand, the

pipeline nominates the prevailing market price or any price other than the new ceiling price, *or* if the pipeline proposes a change in *any* other term of the contract, the producer possesses the unilateral right to reject the offer, cease "negotiations" and terminate the sale. J.A. 159-160; 18 C.F.R. § 270.201(d).[10]

Finally, in Step Three, the producer is given the unilateral right to terminate, upon 30 days' notice, the old gas contract it brought into the GFN process, in any case where the producer rejects the pipeline's nominated price and the producer has identified a new purchaser for the gas.[11] J.A. 160; 18 C.F.R. § 270.201(e)(3) and (4). As part of this step, the Commission also granted the producer an automatic right to abandon under NGA Section 7(b) the service obligation secured by the terminated contract.[12] J.A. 147-148. The Commission said that it did

[10] In Step Two, the pipeline also may ask the producer to nominate a new price for any gas (new or old) sold under any *other* contract between the parties that contains at least some old gas. J.A. 158; 18 C.F.R. § 270.201(b)(2). If a purchaser requests renegotiation of another gas contract in this way, and the parties fail to reach agreement on a new price, the purchaser may terminate the other contract. J.A. 159-160, 296-297.

[11] The requirement that the producer identify a "new purchaser" before terminating an old gas contract is of little practical significance. The producer may discharge its obligation by reselling the gas to anyone. There is also no requirement under the GFN procedure that the new sale be for any specific length of time. Thus, a producer can terminate its contract with an existing pipeline purchaser, resell the gas for one day to a new customer at any price up to the new ceiling, and thereafter be entirely free from Commission regulation.

[12] The producer's obligation to continue existing service arises from the NGA itself. Under Section 7(c) of the NGA, 15 U.S.C. § 717f(c), no sale or transportation of natural gas subject to the Commission's jurisdiction can occur unless the Commission has first issued a certificate reflecting its determination that the proposed transaction will serve the "public convenience and necessity." Once a certificate of public convenience and necessity has been issued for a particular natural gas service, that service must be continued (even after contractual obligations have expired), unless and until the Commission affirmatively authorizes the abandonment

so to ensure the "market responsive" benefits of the rules. *Id.* at 147. In furtherance of that purpose, the Commission excused producers even from submitting an application for abandonment approval under Section 7(b) of the NGA. *Id.* at 147-148.

As a further means of ensuring the alleged "market responsive" benefits of the GFN procedure, the Commission required all natural gas pipelines, including those that had not already agreed to serve as "open access" pipelines under a special certificate from the Commission, to provide transportation of gas released under the GFN procedure. J.A. 46, 176-181. In addition, the Commission gave producers "blanket" sales certificate authorization under NGA Section 7(c) to resell the released gas. *Id.* at 179-181. The Commission thus determined in advance that *any* sale of old gas that *any* producer wanted to make to *any* new purchaser at *any* price up to and including the new ceiling would inevitably serve the public convenience and necessity. The authorization required by Section 7(c) now exists automatically, with no application by the producer, no actual certificate from the Commission, no examination of specific facts associated with the sale, and no opportunity for protest by interested parties (such as respondents).

Order No. 451 thus worked a comprehensive removal of *all* of the NGA regulatory constraints that Congress specifically preserved for old gas in the NGPA. *See* Section 601 of the NGPA, 15 U.S.C. § 3431. In lieu of regulation, "the Commission relie[d] on market forces to assure that purchasers have adequate supplies at reasonable cost." J.A. 304 n.162.

3. *The Commission's response to problems arising from high-price take-or-pay contracts*

In Order No. 451, the Commission devoted scant attention to the problems caused by the proliferation of high-

of the service under Section 7(b), based on a finding that the standards set forth in that provision have been satisfied. *See* 15 U.S.C. § 717f(b).

price take-or-pay clauses in natural gas contracts. The Commission's principal response was to state that "the free operation of market forces will provide a resolution of this issue." J.A. 68. In developing this "solution", the Commission relied on its action in another rulemaking, Order No. 436, in which the Commission also counted on the "workably competitive" market to resolve the take-or-pay problem. *Id.*, *citing* Order No. 436, 50 Fed. Reg. 42,408 (Oct. 18, 1985), and Order No. 436-A, 50 Fed. Reg. 55,217 (Dec. 23, 1985). *See also* J.A. 119-120, 292-295.[13]

F. The Court of Appeals' Decision

The court of appeals ruled that Orders No. 451 and No. 451-A exceeded the authority conferred on the Commission by Congress and were inconsistent with the NGPA. The court therefore vacated the Orders in their entirety. Pet. App. 1a-36a. Observing that the Commission had collapsed the vintaging system and set a single ceiling price for old gas far above the market rate, the court concluded that the Commission had "ignored congressional intent and exceeded its authority by allowing for de facto deregulation of old gas." *Id.* at 17a.

The court of appeals was

> persuaded that Congress deliberately chose to maintain lower old gas prices in order to "[concentrate] the rewards of higher prices where they are most needed—on the development of new, high cost gas" and to elicit "[t]he maximum supply response at a minimum cost to consumers."

[13] After the issuance of Orders No. 451 and No. 451-A, the D.C. Circuit vacated Order No. 436 in *Associated Gas Distributors v. FERC,* 824 F.2d 981 (D.C. Cir. 1987), *cert. denied,* 485 U.S. 1006 (1988). The court held that the Commission's take-or-pay rationale "reflects questionable legal premises and fails to meet the requirement of 'reasoned decision making.'" *Id.* at 1023. After a series of subsequent rulemaking orders, and two more trips to court, the Commission recently succeeded in obtaining judicial approval of a take-or-pay relief mechanism. See *American Gas Association v. FERC,* No. 87-1588 (D.C. Cir. Aug. 24, 1990). This mechanism, however, expressly excludes gas released under the GFN procedures from qualifying for the prescribed take-or-pay relief.

Pet. App. 20a, *quoting* 124 Cong. Rec. 28,633 (1978) (remarks of Sen. Jackson). The court also relied on the Commission's own recognition that lower old gas prices were "a significant feature of the NGPA's design, intended to mitigate the effects on consumers of allowing higher prices for new gas." J.A. 219, *quoted at* Pet. App. 21a. The court therefore ruled that in Order No. 451 the Commission improperly interpreted the scope of its authority under Sections 104(b)(2) and 106 (c). The court said that the Commission should not be permitted to "jettison" what the Commission itself had characterized as a "significant feature" of the NGPA design. Pet. App. 22a-23a.

Turning to the Commission's decision to "pre-grant" permission for producers to abandon their service obligations, the court held that "the Commission has abdicated its responsibility under Section 7(b) of the NGA by providing for an across the board, pre-authorized abandonment provision." Pet. App. 28a. The court relied on "the absence of provisions for factual inquiry into the circumstances of an abandonment" and on the fact that Order No. 451 would "allow a producer, for all practical purposes, to control abandonment through the largely one sided GFN procedure." *Id.* The court found that this producer control was inconsistent with *United Gas Pipe Line Corp. v. McCombs,* 442 U.S. 529 (1979), and would mean in practice that automatic abandonment "would be used only when such utilization would serve the producer's economic interest." Pet. App. 28a.

With respect to Order No. 451's handling of the take-or-pay problem, the court of appeals observed that the Commission had relied on the reasoning set forth in Order No. 436 as the basis for its statement that "the natural forces of competition will resolve the issues surrounding high cost contracts." J.A. 68, *quoted at* Pet. App. 30a. The court of appeals further observed that the D.C. Cir-

cuit, in *Associated Gas Distributors v. FERC, supra*, 824 F.2d at 1023, had rejected Order No. 436 and its rationale, because the Order "failed to effectively address the take or pay problem." Pet. App. 30a. The court of appeals agreed with the D.C. Circuit and found Order No. 451 flawed for the same reason. Pet. App. 31a.

The court of appeals also rejected the Commission's claims that Order No. 451 "will serve to facilitate the renegotiation of high cost contracts." Pet. App. 31a. "Most damaging to the Commission's position," the court said, is the "one-sided nature of the GFN process." *Id.* at 31a-32a. "Surely producers would not initiate the GFN process if by so doing, they ran the risk of giving up more on new gas contracts than they would receive in return for their old gas." *Id.* at 32a. The court therefore found that "the prospect for exacerbating the take or pay problem runs rampant throughout the provisions of Order No. 451" and "that the Commission's inaction on the take or pay problem is based on a rationale which is arbitrary and unsupportable." *Id.*[14]

SUMMARY OF ARGUMENT

This case is not a basic rate case. Rather, the case raises fundamental issues about the nature of the Commission's obligation to adhere to the policies and procedures fixed by Congress. Although petitioners profess agreement with the principle that the Commission must follow Congress' command, the agency actions that petitioners seek to defend diverge markedly from what Congress intended.

In particular, the Commission, acting under color of two ratesetting provisions of limited significance, has attempted to overthrow the comprehensive and detailed pricing policies Congress prescribed in the NGPA to govern future natural gas regulation. Similarly, the Commission has abdicated its longstanding NGA regulatory supervision of the initiation and abandonment of natural gas service, a responsibility that Congress in the NGPA expressly chose to continue for old gas. The court of appeals correctly concluded that neither of these major departures from the congressional plan should be permitted to stand.

[14] Judge Brown dissented from the court of appeals' decision, disagreeing with virtually every conclusion reached by the court. *See* Pet. App. 36a-60a.

I.

The plain language, history, and purposes of the NGPA establish that Congress made an essential policy choice when it enacted the statute. It decided to balance producer and consumer interests by narrowly focusing price incentives to spur the development of new sources of gas supply. At the same time, Congress purposefully chose to withhold additional price incentives from old gas—*for which, by definition, investment decisions already had been made*—unless it otherwise qualified under an incentive-priced NGPA category.

In Orders No. 451 and No. 451-A, the Commission did just the opposite of what Congress intended. By collapsing the vintage prices for all categories of old gas into a single price equal to the highest vintage price, the Commission provided gargantuan price incentives to producers of old gas for the express purpose of stimulating old gas production, discouraging production of new gas, and allowing old gas prices to be set by the market.

Petitioners are wrong in asserting that the legality of the new ceiling price can be determined by examining only Sections 104(b)(2) and 106(c) of the NGPA, which give the Commission the authority to set old gas rates that are "just and reasonable within the meaning of the Natural Gas Act." As the court of appeals correctly held, the Commission is not free to ignore the structure and purpose of the statute as a whole, under the guise of exercising its ratemaking authority.

The Commission's sweeping changes in the NGPA's pricing program also conflict with the statute's legislative history, with the decisions of other courts of appeals

that have interpreted the NGPA, and with prior Commission interpretations of its own authority under the statute. Because Congress has directly addressed the issue presented, arguments about deference to the Commission's current interpretation are inapposite. Cases such as *Chevron, U.S.A. v. NRDC*, 467 U.S. 837 (1984), on which petitioners rely here for the first time, cannot salvage the Commission's action.

II.

Even if, as petitioners urge, this Court were to examine Sections 104 and 106 in isolation, Order No. 451 still would be invalid. The Commission has admitted that the new ceiling price for old gas would not be just and reasonable if it were actually collected by producers. The Commission's only answer to this incongruity is that the GFN procedure will prevent the new ceiling price from being collected. But as the court of appeals correctly found, the GFN is so biased in favor of producers that it cannot act as a meaningful restraint on prices. *Any time* the purchaser offers to pay less than the new ceiling price, the producer is free to end negotiations, terminate the existing contract, sell the gas to another purchaser, and, through the blanket certificate and abandonment procedures, permanently escape *all* future regulation under the Natural Gas Act. The court of appeals did not err in calling the GFN procedure what it is: a one-sided procedure that is "'clearly at odds with Congress' purpose to regulate the supply and price of natural gas.'" Pet. App. 28a, *quoting United Gas Pipe Line Co. v. McCombs*, 442 U.S. 529, 539 (1979).

The Commission's claim that the court of appeals did not disturb Order No. 451's conclusion that the new ceiling price was "just and reasonable" can only be based on an unnatural reading of the court's opinion. The court of appeals held that "the Commission has ignored congressional intent and exceeded its authority by allowing for de facto deregulation of old gas." Pet. App. 17a. That holding, fairly read in the context of the rest of the

court's opinion, inevitably entails the conclusion that Order No. 451's new ceiling price was *not* "just and reasonable."

Moreover, petitioners are wrong in asserting that the validity of Order No. 451 depends primarily (1) on whether the Commission may set a single ceiling price applicable to all old gas (*i.e.*, whether it may eliminate vintaging), and (2) on whether the Commission may use a particular ratesetting methodology known as "replacement costs" to set ceiling prices for old gas. *See* FERC Br. 30-36; Producers Br. 18-23. The Court need not reach either question. As the Court has long recognized in the context of natural gas regulation under the just and reasonable rate standard, "it is the result reached and not the method employed which is controlling." *FPC v. Hope Natural Gas Co.*, 320 U.S. 591, 602 (1944); *Duquesne Light Co. v. Barasch*, 109 S. Ct. 609, 620 (1989). The end result of Order No. 451 is unlawful deregulation of old gas pricing—and the means by which that impermissible result is accomplished are irrelevant.

III.

The Commission's proposal to permit the automatic, permanent abandonment of service obligations pursuant to the GFN procedure is also flawed. Section 7(b) of the Natural Gas Act provides that a requested abandonment can only be approved after "due hearing" and appropriate findings by the Commission. Under Order No. 451, by contrast, the decision to abandon lies in the producers' control, and is accomplished with no oversight and no individual hearing before the Commission.

Petitioners try to justify this scheme by arguing that the required "hearing" was the rulemaking proceeding that resulted in Order No. 451, and that the Commission has already made the necessary "finding" that *all* future abandonments are in the public interest, regardless of the effects they will have on the parties involved. This rationale cannot be squared with *United Gas Pipe Line Co. v. McCombs*, 442 U.S. 529 (1979),

which makes clear that there must be an opportunity for fact finding and a chance for parties to be heard *before* an abandonment can be approved. Indeed, even the cases cited by petitioners confirm that all affected parties must have the opportunity to show that the Commission's general abandonment policy should not apply in their case.

IV.

Finally, the court of appeals correctly ruled that Order No. 451 would exacerbate the problem of high-cost take-or-pay contract provisions and was therefore invalid. The court did not, however, order the Commission to "solve" this problem, or indeed to take any specific remedial action. Petitioner's claim of improper judicial intrusion into the Commission's affairs is without merit.

ARGUMENT

I. THE NEW PRICING STRUCTURE ADOPTED BY THE COMMISSION IN ORDER NO. 451 IS INCONSISTENT WITH THE REGULATORY SCHEME ENACTED BY CONGRESS IN THE NGPA.

A. Like Any Statute, the NGPA Must Be Read as a Whole.

Petitioners' principal argument is that "the court below disregarded the plain meaning of the relevant statutory provisions . . . ." FERC Br. 24; *see also* Producers Br. 18. In their view, only two NGPA provisions—Sections 104(b)(2) and 106(c)—control the outcome of this case, and those provisions can be properly understood in a vacuum, with only the aid of a dictionary. Petitioners focus primarily on eleven words within Sections 104(b)(2) and 106(c)—"just and reasonable within the meaning of the Natural Gas Act"—and act as if those words alone can establish the validity of the wholesale revision of natural gas pricing policies effected by Order No. 451. Petitioners are wrong. Their argument ignores the necessity of reading Sections 104(b)(2) and 106(c) in the context of the entire NGPA.

This Court has frequently rejected readings of a statute that focus on statutory phrases examined in isolation. Time and again, the Court has stressed that "the words of a statute must be read in their context and with a view to their place in the overall statutory scheme." *Davis v. Michigan Dept. of Treasury*, 109 S. Ct. 1500, 1504 (1989). As the Court said in *Pilot Life Insurance Co. v. Dedeaux*, 481 U.S. 41, 51 (1987), "in expounding a statute, we are not guided by a single sentence or member of a sentence, but look to the provisions of the whole law, and its object and policy" (*quoted with approval in Dole v. United Steelworkers*, 110 S. Ct. 929, 934 (1990), and *Massachusetts v. Morash*, 109 S. Ct. 1668, 1673 (1989)).[15]

When the NGPA is read as a whole, and Sections 104(b)(2) and 106(c) are interpreted from the perspective of their place in the full statutory scheme, those provisions cannot support Order No. 451. The NGPA did not, in two short provisions added with no debate at the very end of the legislative process, authorize the Commission to reverse the fundamental congressional decision not to deregulate old gas and not to provide broad new incentives for the continued production of such gas.

B. Read as a Whole, the NGPA Does Not Permit Petitioners' Interpretation of Sections 104(b)(2) and 106(c).

As this Court has held, the NGPA was "designed to supplant the Commission's authority to establish rates for the wholesale market . . . ." *Mid-Louisiana*, 463 U.S. at

[15] *See also United States v. Morton*, 467 U.S. 822, 828 (1984) ("We do not, however, construe statutory phrases in isolation; we read statutes as a whole"); *Offshore Logistics, Inc. v. Tallentire*, 477 U.S. 207, 220-221 (1986); *Stafford v. Briggs*, 444 U.S. 527, 535 (1980); *Philbrook v. Glodgett*, 421 U.S. 707, 713 (1975); *Chemehuevi Tribe of Indians v. FPC*, 420 U.S. 395, 403 (1975); *Allied Chemical Workers v. Pittsburgh Plate Glass Co.*, 404 U.S. 157, 185 (1971); *Mastro Plastics Corp. v. NLRB*, 350 U.S. 270, 285 (1956); *Brown v. Duchesne*, 60 U.S. (19 How.) 183, 194 (1857).

331. The statute "establish[ed] an exhaustive categorization of natural gas production, and [set] forth a methodology for calculating an appropriate ceiling price within each category . . . ." *Id.* at 332. The exhaustive categorization established by Congress was purposeful. It evidenced Congress' intent to create a *comprehensive* pricing policy to govern future natural gas regulation—an intent that Congress confirmed through its extension of price controls to intrastate gas and through its establishment of a catch-all category (and ceiling price) for any natural gas not otherwise included in an NGPA category. *Transco*, 474 U.S. at 421; *Mid-Louisiana*, 463 U.S. at 332-333. Congress deliberately left no gaps for the Commission to fill.

Under the pricing scheme prescribed by Congress, "new" and "difficult-to-produce" natural gas, both of which are defined in intricate and extensive detail on the face of the NGPA, are entitled to increased ceiling prices "to provide investors with adequate incentives to develop new sources of supply." *Mid-Louisiana*, 463 U.S. at 334. Congress insisted that, before a producer could actually receive these incentive prices, it had to comply with the rigorous qualification procedures set out in Section 503, 15 U.S.C. § 3413, the lengthiest and most detailed provision of the NGPA.

Congress treated old gas very differently from new and difficult-to-produce gas. As this Court has observed, the NGPA "evinces careful thought about the extent to which producers of 'old gas' . . . would be able to enjoy incentive pricing." *Mid-Louisiana*, 463 U.S. at 334. Congress provided no new incentives for old gas, except to the extent a particular producer or a particular well could qualify for an incentive price under some provision of the statute other than Sections 104 and 106. As a senior DOE official recognized as recently as last year, "[t]o help maintain consumer prices, the NGPA kept price controls on gas discovered before April 1977. Thus, while the NGPA created incentives to produce high-cost

new gas, it prolonged *disincentives* for full production of low-cost old gas." *Natural Gas Price Controls: Hearing on H.R. 1595 before the Subcomm. on Energy and Power of the House Comm. on Energy and Commerce*, 101st Cong., 1st Sess. 13 (1989) (hereafter "*H.R. 1595 Hearing*") (testimony of J. Allen Wampler, Assistant Secretary for Fossil Energy) (emphasis added).

Congress' choice was eminently logical: incentives are to bring about an action not yet taken. "[S]ince producer-investment decisions with regard to [old] gas had already been made, there was no need to calibrate the price of that gas to the costliness of its production." *Consolidated Edison Co. v. FERC*, 823 F.2d 630, 633 (D.C. Cir. 1987). Congress therefore "directly incorporate[d] part of the 'vintaging' pattern that previously existed under the NGA . . . increased over time in accordance with the inflation formula found in § 101." *Mid-Louisiana* at 334-35.

In Order No. 451, the Commission turned the detailed and hard-fought congressional compromise on its head. The Commission admitted that a basic objective of its action was to stimulate the production of old gas, the great majority of which needs *no* additional incentive for continued production, and at the same time to discourage the production of new gas. J.A. 147. Substituting its own policy judgment for that of Congress, the Commission established a general "incentive" price for old gas.

The Commission readily acknowledged that it derived the new Order No. 451 ceiling by focusing on replacement costs, rather than historical costs. J.A. 81-83, 233, 237. Replacement costs are designed to measure what it would cost to find and develop new gas resources today. *See* Producers Br. 9 ("replacement cost measures the current cost of finding new gas fields, drilling new wells and producing new gas"). The replacement cost methodology is intended to produce an incentive price, and in fact, as used by the Commission in Order 451, it produced not

only an incentive price but a windfall substantially above what was needed to permit old gas producers to recover their investment plus a reasonable return.

The "incentive" ceiling price adopted for old gas in Order No. 451—and the average actual price currently being paid for old gas—exceed the price that a great deal of new gas production is receiving today. Indeed, the majority of new gas production is today deregulated as a result of Section 121 of the NGPA, and it therefore receives only a market price. That market price has been substantially below the Order No. 451 ceiling price ever since Order No. 451 was promulgated, and it remains so today, as petitioners concede. FERC Br. 28: Producer Br. 25. The bottom line is that the very gas for which Congress decided not to provide incentive prices is now covered by such prices, while much of the gas for which Congress expressly chose to provide incentives now has been deregulated in accordance with the congressional plan and is governed entirely by the market. The Commission has thus created "a system of price supports for producers" of old gas, in direct violation of congressional intent. *Martin Exploration*, 486 U.S. at 210.

Recent studies document the serious, anti-consumer impact of the Commission orders. In the nearly four years since the orders became effective, they have cost the public hundreds of millions of dollars in additional payments for old gas already dedicated to the interstate market.[16]

[16] The costs of Order No. 451 can be measured by the huge increases in old gas prices that have occurred since the order became effective. *See Gas Costs, Resale and Transportation Rates of Pipeline Companies—A Monthly Service*, Foster Associates (Jan. 25, 1989), Summary Table 4 (between March 1986 and January 1989, the price of old gas increased by 44%); Interstate Natural Gas Association of America, *The Washington Report*, No. 1450, at 9 (Sept. 29, 1989) (Order No. 451 led to a net gas cost increase of approximately $215 million in 1988 alone); *H.R. 1595 Hearing*, at 27 (DOE chart, a copy of which is reproduced in Appendix C, *infra*, shows that in 1987, after Order No. 451 became effective, the price of flowing, old gas jumped and exceeded average wellhead prices).

Petitioners' self-serving efforts to recast Order No. 451 as a pro-consumer measure (FERC Br. 13, 21; Producers Br. 26) are implausible on their face. The order is a tremendous boon to producers. That is why the producers support it. The order disfavors consumers. That is why every segment of the natural gas industry other than producers—including state regulatory commissions, state consumers advocates, other consumer protection organizations, local distribution companies, and interstate pipelines—oppose the Commission's action. This is not, as petitioners apparently maintain, a case in which neither side knows where its self-interest lies.

C. Prior Judicial Decisions Support the Court of Appeals' Construction of Sections 104 and 106.

Every court that has construed the pricing provisions of the NGPA has recognized the clear congressional purposes that are embodied in the statute. For example, in *Pennzoil Co. v. FERC*, *supra*, the Fifth Circuit stated that the NGPA "adopted an incentive-based approach to rate-setting for gas production, providing substantially higher prices for 'new' gas than was currently available. At the same time, the NGPA provided consumer protection by maintaining lower prices on flowing gas . . . ." 645 F.2d at 367 (footnote omitted). *See also Columbia Gas Development Corp. v. FERC*, 651 F.2d 1146, 1160 (5th Cir. 1981) (the NGPA "reflects a careful balance between two statutory principles: (1) incentive pricing for new gas . . . and (2) maintenance of NGA price controls on old gas to prevent unnecessary price increases").

The D.C. Circuit has reached the same conclusion. *See Interstate Natural Gas Association of America v. FERC*, 716 F.2d 1, 14-15 (D.C. Cir. 1983), *cert. denied*, 465 U.S. 1108 (1984) ("Congress itself specified the maximum lawful prices of most categories of gas and authorized the Commission to raise those prices only in certain, very limited, circumstances."); *See also Consolidated Edison Co. v. FERC*, *supra*, 823 F.2d at 633 ("[a]ll of the

legislators agreed that the regulatory structure of the [NGA] would continue to govern pre-NGPA 'old' gas").

Similarly, in *Martin Exploration Management Co. v. FERC*, 813 F.2d 1059, 1064 (10th Cir. 1987), *rev'd on other grounds*, 486 U.S. 204 (1988), the court of appeals stated:

> The NGPA established ceiling prices for each of [the] categories of natural gas production. In general, the lowest ceiling prices were for old gas, higher ceiling prices were established for new gas, and the highest ceiling prices were for difficult to produce gas. The purpose of creating different ceilings was to create an incentive to drill for new gas, particularly gas that is costly to produce.

See also ANR Pipeline Co. v. FERC, 870 F.2d 717, 719 (D.C. Cir. 1989) (Congress enacted the NGPA "to encourage the development of *new* sources of natural gas that would have proven uneconomic under existing [NGA] price ceilings") (emphasis added).

D. The Commission's Own Interpretations of the NGPA Prior to 1986 Are Inconsistent with Order No. 451.

As the earlier summary of the Commission's NGPA rulemaking proceedings shows (*see* pages 8-18, *supra*), the Commission did not write Orders No. 451 and No. 451-A on a blank slate. Dpring the eight years from the enactment of the NGPA to the issuance of Order No. 451, the Commisison took numerous actions and made numerous statements that run counter to the interpretation of the statute that the Commission now espouses.

First, the Commission conducted an extended rulemaking proceeding concerning the implementation of its authority under Sections 104(b)(2) and 106(c). The underlying assumption throughout that proceeding was that the provisions were intended to authorize the Commission to grant "special relief" to individual producers whose particular circumstances were such as to render the existing vintaged ceiling price inadequate and confisca-

tory. *See* pages 11-13, *supra; see also Permian Basin*, 390 U.S. at 770-774.

The Commission explictly stated its view that, when Congress included Sections 104(b)(2) and 106(c) in the NGPA, its purpose was to "provide[] a link between the NGA's special relief procedures and the NGPA . . . ." 49 Fed. Reg. at 29,910. The congressional aim was to make available "a 'safety valve' for area or national rates that might otherwise have been confiscatory." *Id.* at 29,912. The Commission reiterated that view in the course of its handling of individual applications for special relief. *See, e.g., A.O. Phillips*, 27 F.E.R.C. ¶ 61,463, at 61,728 (1984).

Now, in a self-serving effort to disavow its earlier position, the Commission labels this reading of Sections 104(b)(2) and 106(c) a "crabbed construction" (FERC Br. 29), and attempts to create the impression that the court of appeals invented this interpretation. FERC Br. 19. The Commission's argument is remarkable, in light of the fact that the Commission itself—not once, but several times—interpreted Sections 104(b)(2) and 106(c) as special relief measures.

Second, the Commission summarily rejected a producer-sponsored attempt to convert old gas priced under Sections 104 and 106 to gas qualifying for higher prices under Section 109, through the artifice of drilling an unnecessary "new" well in an old gas field. *See* the discussion of Order No. 72, at pages 13-14, *supra*. The Commission found that it would be "neither reasonable nor consistent with the pricing scheme of the NGPA" to allow old gas to receive the Section 109 price through this scheme. 45 Fed. Reg. at 18,918. It also concluded that applying the Section 109 price would violate the congressional plan to encourage the production of *new* gas, rather than to induce further capital investment for the production of old gas, which, by definition, was already available to the market. *Id.* at 18,917.

The Commission has reversed those policy decisions in Order No. 451. It has made the Section 109 ceiling price applicable to old gas generally and has thus enabled producers to obtain for old gas the very price that the Commission previously said was unreasonable. Under Order No. 451, the producers can obtain this price without even going through the effort and expense of drilling a "new" well, as they proposed to do in the Order No. 72 proceeding. The Commission has also decided that producers should now be allowed to receive an incentive price for old gas, despite the Commission's earlier recognition that this was contrary to congressional intent.

Third, in 1983, in Order No. 107-A, the Commission used its authority under Section 107(c)(5) of NGPA to establish an incentive price for the production of old gas through production enhancement techniques. *See* pages 14-16, *supra.* To ensure that the new incentive was "reasonable" and "necessary" to stimulate production of gas that otherwise would not be produced, the Commission imposed stringent substantive and procedural requirements that had to be met before a producer of old gas could qualify for the incentive. 48 Fed. Reg. 45,100.

The Commission set a *maximum* incentive ceiling for old gas to be produced through production enhancement techniques—a maximum that was equal to the ceiling price later adopted for all old gas in Order No. 451—and it provided that that ceiling would be *reduced* if the incremental production resulting from the incentive price involved costs per units of production that the Commission deemed prohibitive. *See* 18 C.F.R. 271.704.

The Commission also expressly distinguished the "special relief" authorized by Sections 104(c)(2) and 106(c) from the incentive prices authorized by Section 107. In the Commission's view, the special relief provisions "are intended to provide economic relief after the fact, that is, after the producer undertook to develop and produce gas," whereas the incentive prices authorized in Section 107 were "intended to provide an incentive *in advance* of drilling activity to encourage production where it may not have been economically feasible." 48 Fed. Reg. at 45,101 (emphasis in original).

Now, by invoking its Section 104(b)(2) and Section 106(c) authority as a basis for Order No. 451, the Commission has in effect eliminated Section 107(c)(5) from the NGPA, at least as far as old gas is concerned. The Commission has given *all* old gas the maximum incentive it was ever prepared to allow under Section 107(c)(5) for old gas that qualified under the production enhancement rule, and it has done so without any guarantee that any additional gas will be produced or any production enhancement techniques used.

Fourth, in its so-called "block-billing" rulemaking, which proposed the apportioning of different categories of gas among different sectors of the market, the Commission acknowledged that Congress wanted the economic benefits associated with old gas to go to consumers, not producers, and the Commission further admitted that old gas prices were not to be left to market forces. In the Commission's words, old gas "is not market responsive *specifically by legislative intent.*" 50 Fed. Reg. at 42,376 (emphasis added). Order No. 451 represented an abrupt about-face from this position.

E. The Legislative History of the NGPA Supports the Court of Appeals' Decision.

"The message conveyed by the plain language of [the NGPA] is confirmed by an examination of its history." *INS v. Cardoza-Fonseca*, 480 U.S. 421, 432 (1987). Although petitioners argue that the court of appeals relied on only some parts of the legislative history while ignoring others (*see* FERC Br. 36-38), there are two points about which there can be no genuine disagreement.

First, the NGPA was intended to be a compromise measure by Congress. As the court of appeals pointed out, the statute was the product of "some nineteen months of heated Capitol Hill debate" between the mem-

bers of Congress who favored deregulation and those who did not. Pet. App. 17a. This compromise included specific decisions about which categories of gas were to be free from price controls and which categories were to continue to be subject to price controls. The Commission may not undo this choice simply by claiming that its orders reflect a more rational and orderly scheme for regulating natural gas. As the Court has stated, "deciding what competing values will or will not be sacrificed to the achievement of a particular objective is the very essence of legislative choice—and it frustrates rather than effectuates legislative intent simplistically to assume that *whatever* furthers the statute's primary objective must be the law." *Rodriguez v. United States*, 480 U.S. 522, 526 (1987) (*per curiam*).

Second, there can be no dispute that the NGPA intended to establish a pricing structure that would encourage the production of *new* gas by raising prices for such gas and at the same time would protect consumers by ensuring that *old* gas prices remain low. As Senator Jackson, the Senate Manager of the conference committee bill explained, the NGA proposed "a policy which concentrates the rewards of higher prices where they are most needed —on the development of new, high cost gas . . . ." 124 Cong. Rec. 28,633 (1978). In this way, he said, the bill "will encourage production while protecting consumers from paying unnecessarily high prices for gas that they could expect to receive at lower prices under current policies." *Id.*[17]

[17] Similarly, Representative Dingell, the House Manager of the conference committee bill, stated that the focus of the NGPA is to bring "the greatest supply response at the least cost to consumers." 124 Cong. Rec. 38,361 (1978); *see also* 124 Cong. Rec. 28,884 (remarks of Senator Hart) (consumers should be protected by regulations that prevent the price of inexpensive old gas from rising); 124 Cong. Rec. 28,865 (1978) (remarks of Sen. Domenici) (elimination of vintaging and deregulation of old gas "not doable" or even suggested); 124 Cong. Rec. 29,108 (1978) (remarks of Senator

The two snippets of legislative history cited by the Commission (FERC Br. 37) consist of statements made by two Senators who opposed the NGPA and who played no leadership roles in its enactment. But "[t]his Court does not usually accord much weight to the statements of a bill's opponents." *Shell Oil Co. v. Iowa Department of Revenue*, 109 S. Ct. 278, 284 (1988). As the Court explained in *Schwegmann Brothers v. Calvert Distillers Corp.*, 341 U.S. 384, 394 (1951), and then repeated in *Gulf Offshore Co. v. Mobil Oil Corp.*, 453 U.S. 473, 483 (1981), "[t]he fears and doubts of the opposition are no authoritative guide to the construction of legislation."

In sum, Order No. 451 does precisely the opposite of what Congress intended: it attempts to bring down the price of new gas (thereby discouraging production) by raising the price of old gas. *See* J.A. 147. The legislative history merely adds compelling support to the conclusion that flows from the NGPA itself. Whether or not Order No. 451's alteration of the NGPA's priorities and goals was a good idea—and respondents submit that the order was not a prudent means of trying to encourage the production of low-cost old gas—it is dramatically different from what Congress had in mind when it passed the NGPA. It marks a major policy shift of the kind that can properly be effected only by Congress itself.[18]

McIntyre) ("This compromise . . . does provide substantial incentives for the production of more domestic natural gas. And at the same time it provides a measure of protection for consumers from sudden and unwarranted price increases").

The statement of Senator Domenici submitted to the Commission in the Order No. 451 rulemaking proceeding and now relied upon by petitioners (*see* Producers Br. 28-29) for the asserted purpose of "clarifying" statements made eight years earlier during the NGPA debate should be accorded no weight. Senator Domenici's *post hoc* rationalization of statements made during the debate cannot alter the statutory language or the intent of the Congress that enacted the NGPA.

[18] In fact, Congress has now taken such action, prospectively, in the Natural Gas Wellhead Decontrol Act of 1989, Pub. L. No. 101-60, 103 Stat. 157. *See* note 20, *infra*.

F. "Deference" to the Commission's Current Interpretation of the NGPA Is Not Appropriate.

A recurring theme in petitioners' briefs is that the court of appeals failed to defer to the Commission's reading of the NGPA, choosing instead to "substitute" its own interpretation of what the statute means. *See* FERC Br. 24-25; Producers Br. 14, 23, 30-31 (citing *Chevron U.S.A. v. NRDC*, 467 U.S. 837 (1984)). Although petitioners chastise the court of appeals for its alleged failure to adhere to the principles of *Chevron* (Producers Br. 14), it is worth noting that petitioners themselves have only recently discovered the supposedly dispositive effect of that decision. *Chevron* was not discussed or even cited in petitioners' briefs to the court of appeals.

In any event, *Chevron* does not help petitioners' position. It is not some magical incantation, the mere mention of which can divert the courts from their proper role in statutory interpretation. First and foremost, *Chevron* reconfirms the well-established proposition that, "[t]he judiciary is the final authority on issues of statutory construction and must reject administrative constructions . . . which are contrary to clear congressional intent." 467 U.S. at 843 n.9. *See also FEC v. Democratic Senatorial Campaign Committee*, 454 U.S. 27, 32 (1981) (courts, as final authorities on statutory construction, must reject interpretations "that are inconsistent with the statutory mandate or that frustrate the policy that Congress sought to implement").

In this case, because Congress has clearly spoken on the issues that are the subject of Orders No. 451 and No. 451-A, petitioners' arguments about "deference" to the Commission's interpretation of the NGPA are misplaced. *See, e.g., Regents of the University of California v. Public Employment Relations Board*, 485 U.S. 589, 602 (1988) ("Because we have been able to ascertain Congress' clear intent based on our analysis of the statutes and their legislative history, we need not address the issue of deference to the agency"). The language and purpose of the NGPA leave no doubt that Congress intended

to continue regulation of old gas and that it did not intend to provide broad new incentives for such gas.

In addition, Congress could not have been more clear about when price controls were to be removed from natural gas, and which categories of gas were to receive this treatment. In Section 121 of the NGPA, Congress provided a detailed description of the phased-in deregulation plan that Congress enacted as part of the NGPA compromise. Old gas covered by Sections 104 and 106(a) was not included in any of the Section 121 deregulation categories.

In the NGPA, Congress has deliberately and clearly chosen *not* to leave the regulatory scheme for the agency to devise. Congress replaced the Commission's broad regulatory authority under the NGA with a comprehensive and detailed prescription for how different categories of natural gas were to be treated after 1978. Congress set the course and the agency was obliged to adhere to it. As one federal judge wrote shortly before the NGPA was enacted, "A Congress genuinely concerned about delegated power has one effective contribution that it, and only it, can make—the identification and definition, as precisely as possible, of that power, and of the standards to be observed in its exercise." C. McGowan, *Congress, Court and Control of Delegated Power*, 77 Colum. L. Rev. 1119, 1174 (1977). Here, Congress provided a precise program, and the Commission was not free to disregard and replace it.[19]

Petitioners urge the Court nevertheless to ignore the NGPA as a whole, and simply to determine whether the

[19] Refusing to defer to the Commission is especially appropriate here, because Orders No. 451 and No. 451-A are inconsistent with the Commission's own prior contemporaneous interpretations of the NGPA, as shown in detail above. As this Court has long recognized, "[a]n agency interpretation of a relevant provision which conflicts with the agency's earlier interpretation is 'entitled to considerably less deference' than a consistently held agency view." *INS v. Cardoza-Fonseca*, 480 U.S. 421, 446 n.30 (1987), quoting *Watt v. Alaska*, 451 U.S. 259, 273 (1981).

Commission's interpretation of Sections 104(b)(2) and 106(c) is reasonable under *Chevron.* But as the Court made clear just last term, an agency may not rely on this kind of flexible standard to justify a result that is inconsistent with the congressional scheme.

In *Maislin Industries, U.S. v. Primary Steel,* 110 S. Ct. 2759 (1990), the Interstate Commerce Commission ("ICC") had construed its organic statute to relieve shippers of the duty to pay the freight rates that were on file with the ICC, if the shipper had privately negotiated a lower rate with a carrier. This interpretation was based in large part on the ICC's authority to determine when rates were "reasonable." *See id.* at 2767. The ICC concluded that the practice of trying to collect the filed rates was itself "unreasonable" if the parties had negotiated a lower price. This determination, said the ICC, was entitled to deference because it was not specifically prohibited by the statute, and because it was "reasonable." *Id. at* 2768 (citing *Chevron,* 467 U.S. at 843).

This Court disagreed. Among other things, the Court found that the carriers' duty to file rates, and the shippers' duty to pay those rates, were "utterly central" to the structure and purpose of the statute, and that any attempt to circumvent these duties was inconsistent with both the "statutory scheme as a whole," and certain sections of the statute in particular. 110 S. Ct. at 2768, 2769. And, while the ICC argued that this interpretation had become outdated as a result of statutory amendments that were designed to increase competitiveness in the industry, the Court made clear that it was not the agency's role to determine what Congress *should* have intended or *would* have intended, but only what it *actually* intended: "If strict adherence to §§ 10761 and 10762 as embodied in the filed rate doctrine has become an anachronism in the wake of the [new statute], it is the responsibility of Congress to modify or eliminate these sections." *Id.* at 2771.

This reasoning is equally applicable to the current case. The "statutory scheme as a whole" leaves no doubt that

meaningful regulation of old gas prices was to continue and that Congress did not intend to provide new incentives for the production of old gas. The quality of the Commission's reasons for adopting a contrary approach is therefore irrelevant. Even if, as the Commission claims, the "anachronistic, multi-tiered system of vintage pricing" has contributed to problems in the natural gas industry (FERC Br. 20), it is for Congress, not the Commission, to resolve this problem.[20]

II. EVEN IF VIEWED SOLELY FROM THE PERSPECTIVE OF THE "JUST AND REASONABLE" PROVISIONS IN SECTIONS 104(b)(2) AND 106(c), ORDER NO. 451 CANNOT STAND.

This Court long has recognized that "[u]nder the statutory standard of 'just and reasonable' it is the result reached and not the method employed which is controlling." *FPC v. Hope Natural Gas Co.,* 320 U.S. 591, 602 (1944); *see also Permian Basin,* 390 U.S. at 775; *Duquesne Light Co. v. Barasch,* 109 S. Ct. 609, 617 (1989) (it is not the theory but the impact of the rate order that counts). Petitioners pay lip service to the *Hope* "end result" test, but then proceed to ignore it by arguing about the theory underlying Order No. 451, rather than about the order's actual impact. *See* FERC Br. 31-33; Producers Br. 21-23.

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[20] Congress in fact has elected to change the NGPA pricing policies, and it has done so by enacting the Natural Gas Wellhead Decontrol Act of 1989. Pub. L. No. 101-60, 103 Stat. 157. Under this statute, the price controls on all natural gas, including all old gas, will be eliminated entirely on January 1, 1993. Private parties can, however, "deregulate" old gas through negotiation at any time beginning on July 26, 1989. *See* Section 2(a), 103 Stat. 157.

Given that Congress has specifically determined *when* price restraints are to be removed, and *how* that is to occur, and given that the Commission has attempted to remove price restraints several years earlier, and has devised its own GFN procedure for doing so, the Commission's belief that the Wellhead Decontrol Act "confirms the soundness" of Order No. 451 (FERC Br. 49) is difficult to fathom.

When Order No. 451 is evaluated in terms of its practical effect, the entire order—and especially its sharp increase in the ceiling price applicable to old gas—cannot qualify as "just and reasonable within the meaning of the Natural Gas Act." This is so for two different, but related, reasons.

First, the new ceiling price cannot be "just and reasonable" under the NGA, because it is a rate that the Commission itself believes should not be collected. This is contrary to the very essence of a "just and reasonable" rate under the NGA, which by definition is a rate that is to be charged and collected.

Second, the impact of Order No. 451 is to deregulate old gas, and to leave the sale, pricing, and abandonment of such gas almost entirely to market forces. This outcome cannot be "just and reasonable" in light of Congress' clear intent to continue regulation of old gas and to use the "just and reasonable" language as a means of perpetuating the NGA's regulatory regime.

A. The Order No. 451 Ceiling Price Cannot Be "Just and Reasonable," Because the Commission Has Conceded that the Price Should Not Be Collected.

By the Commission's own admission, the new Order No. 451 ceiling price is a price that should not be collected. The Commission expressly found that actual collection of the new ceiling price as a result of price escalator clauses "would distort the market as much as current artificially low ceiling prices." J.A. 141. Accordingly, the Commission declared that producers with escalator clauses "should not automatically receive the new ceiling price." *Id.; see also id.* at 310. The Commission concluded that consumers needed to be "protected" from the new ceiling price, and it devised the GFN procedures for the avowed purpose of providing such protection. The Commission's brief confirms this point. *See* FERC Br. 13-15, 21, 40, 42.

The Commission's recognition of the need to protect consumers from the new ceiling price underscores the defects in Order No. 451. The entire point of "just and reasonable" rate regulation is the establishment of a rate that, if collected, will protect purchasers through a proper balance of consumer and producer interests. *Permian Basin*, 390 U.S. at 776. The fact that the Commission felt obliged to create a negotiation procedure to ameliorate the effects of the Order No. 451 ceiling price shows that that price is not "just and reasonable" within the meaning of the NGA.

What the Commission essentially did in Order No. 451 was to assert that, for old gas, a new "just and reasonable" rate existed somewhere between the existing rate and the new ceiling price. The Commission declined, however, to say what the "just and reasonable" rate was and, through the GFN procedure, it ensured that it would play no role in establishing that rate. The Commission did not engage in "just and reasonable" *ratemaking* at all; rather it sought to create a *rate negotiating* process, to avoid the new ceiling that the Commission itself set.

As the Commission said in Order No. 451, the GFN procedure was adopted "as an integral part of the new ceiling price itself . . . ." J.A. 43. The Commission asserted that the procedure would permit market factors to serve as the actual determinants of the rates to be charged for old gas and would thus help to prevent the new ceiling price from actually appearing in the marketplace.

But just and reasonable ratemaking under the NGA does not involve the creation of hypothetical rates that would be unjust and unreasonable if actually collected. Under Sections 4 and 5 of the NGA, the Commission is obliged to prescribe just and reasonable rates that can actually be "demanded, observed, charged, or collected . . . ." 15 U.S.C. § 717d(a). The "just and reasonable" standard cannot be satisfied by a rate whose use the Commission believes must be discouraged.

The inability of the Order No. 451 ceiling price to satisfy the "just and reasonable" standard becomes even more apparent when the obvious defects in the GFN procedure itself are considered. Because that procedure is hopelessly skewed in favor of the producers, it cannot possibly fulfill the role that the Commission envisioned. In fact, the procedure can be and has been used to extract from some purchasers the very ceiling price that the Commission thought should not be collected. *See, e.g.*, the documents reproduced in the appendix to respondents' brief in opposition, at 17a-30a.

The court of appeals correctly found that the GFN process has no appreciable impact on producers' ability to command the new ceiling price from purchasers. *See* Pet. App. 13a-15a, 31a-32a. The apparent theory behind the GFN procedure was that *if* producers and purchasers had relatively equal bargaining strength, the price that would result from their negotiations would be somewhere near the market price, and thus below the new ceiling price. *See* J.A. 295-297. In fact, however, the GFN process grants almost all bargaining power to the producer. Only the producer can initiate the process. He does so by asking the purchaser to nominate a new contract price. If the purchaser nominates any price *other* than the new ceiling price, the producer has the unfettered right to terminate the contract, sell the gas to a new buyer, and automatically abandon its sales obligations to its existing customer. J.A. 159-160. To describe this procedure as "negotiation" stretches that term beyond its reasonable meaning.[21]

The Commission has attempted to respond to the clear defects in the GFN procedure with four arguments designed to show that the purchaser actually has a "decisive role" in the process. FERC Br. 42. None of these arguments has merit.

[21] Nor is there even a requirement that producers act in "good faith." There is no mechanism in the Orders to ensure or even examine whether the producer is deliberately attempting to exploit its purchasers by insisting on above-market prices. The producer's state of mind is irrelevant. The name "good faith" negotiations is only a label, not a requirement.

First, the Commission points out that "the GFN procedure was included in the Order to protect *purchasers* from the consequences of automatic price-escalation clauses." Regardless of how well-intentioned the Commission may have been, however, its motive is irrelevant to whether the GFN procedure actually affords purchasers any meaningful protection.

Second, the Commission argues that once the GFN process is triggered, "if the purchaser signals an intent to continue to purchase old gas at a mutually agreed-upon price, the producer cannot 'unilaterally' abandon sales." This point simply ignores the central problem of the procedure, which is that the producer has *no* incentive to reach any "mutually agreed-upon price" other than the new ceiling price, and may use the threat of termination and abandonment to obtain it. The fact that a producer can be prevented from abandoning its obligation if the customer agrees to the producer's terms, *i.e.*, agrees to pay the new ceiling price, is sparse protection indeed. To obtain the "protection" touted by the Commission, the customer must agree to pay the very price against which the GFN procedure is supposed to be protecting.

Third, the Commission claims that once the GFN procedure is invoked, a purchaser "may often" realize substantial benefits, because the procedure gives the purchaser the "opportunity to reopen the price terms of any contract with the producer that involves the sales of some old gas, including contracts that expose the purchaser to take-or-pay liability." But, as the court of appeals correctly observed (Pet. App. 28a), this "opportunity" will rarely, if ever, be of use to a purchaser, because it is the producer who has the sole right to initiate the GFN process, and only a producer that is unable accurately to assess its own self-interest would be likely to initiate the

process in a situation where it might help the purchaser more than the producer.

Finally, the Commission makes the related argument that the purchaser has "an important reciprocal right" that supposedly corresponds to the producer's right of abandonment: if the parties do not reach an agreement on price, the purchaser may terminate any other contract it has with the producer, as long as the other contract involves some old gas. This, the Commission implies, may enable a purchaser to rid itself of some undesirable contracts covering a small amount of old gas and a greater quantity of high-cost new gas. The initial problem, of course, is that, as the Commission admitted (J.A. 317, 320), most high-cost take-or-pay contracts that present problems for pipeline purchasers involve *only new* gas and thus cannot qualify as so-called "multi-vintage" contracts covered by the Commission's rule. More important, even if a pipeline has entered into such multi-vintage contracts, the GFN procedure is unlikely to provide protection. Just as a producer is unlikely to initiate the GFN process unless it will serve the producer's economic interest, so a producer is unlikely to terminate a contract and abandon a service obligation unless it believes that the result of the entire process, including any possible termination by the purchaser, will favor the producer. *See* Pet. App. 31a-32a.

In short, when the GFN procedure is evaluated on the basis of its actual operation, the Commission cannot credibly maintain that "concerns about the fairness of the GFN . . . are unfounded" (FERC Br. 42).

B. Order No. 451's New Ceiling Price for Old Gas Is a Central Feature of the Commission's Unauthorized Deregulation of Old Gas and Therefore Is Not "Just and Reasonable."

Under *Hope's* "end result" test, Order No. 451 should be examined as a whole, and the dramatic increase in the ceiling price for old gas should be considered as a major part of the Commission's overall plan to discontinue old

gas regulation. Order No. 451 cannot survive scrutiny from this perspective.

In the NGPA, Congress decided to continue rate regulation for old gas. Sections 104 and 106 preserved the existing pricing structure for such gas, and Section 601, 15 U.S.C. § 3431, did not include old gas in the list of gas categories to which the provisions of the NGA would no longer apply. The result was to make clear that Congress expected the Commission (1) to continue to exercise its ratemaking authority under Sections 4 and 5 of the NGA, within the bounds fixed by Sections 104 and 106 and the rest of the NGPA, and (2) to continue its traditional certificate and abandonment regulatory responsibilities under Section 7 of the NGA.

Yet the Commission has in virtually every respect sought to walk away from its regulatory obligations under the statute. It has increased the ceiling price for old gas to a level so far above the market that the ceiling plays no effective role in regulating prices. It has permitted automatic abandonments of service obligations, with no opportunity for affected persons to be heard in opposition. In fact, it has granted an across-the-board advance authorization for abandonment even of service that has not yet begun to customers that have not yet been identified.

Similarly, the Commission has granted blanket certificates of public convenience and necessity, in advance, for any sale, now or in the future, of any gas that is released from its existing customer, under the GFN process. With respect to such gas, the Commission has also completely relieved producers of any obligation to file their rates, make their contracts available for public inspection, and charge only the rates on file. Likewise, the Commission has surrendered its authority to investigate whether the rates actually charged for released old gas are just and reasonable. Producers are not obliged even to inform the Commission of such rates, much less to submit them for the Commission's review. J.A. 46.

In a fundamental sense, the action taken by the Commission in Order No. 451 parallels the "negotiated rates" policy established by the ICC and recently rejected by this Court in *Maislin Industries, U.S. v. Primary Steel*, 110 S. Ct. 2759 (1990). Relying on statutory amendments that in its view were designed to create a "more competitive environment," the ICC attempted to justify its decision to relieve shippers of the obligation to pay the rate on file with the agency, whenever the shipper had privately negotiated a lower rate with a carrier. The Court held that the ICC's pro-competitive policy choice could not be reconciled with the regulatory mandate embodied in the ICC's governing statute.

The ICC attempted to authorize wholesale departures from the filed rate system established by Congress. It essentially contended that it had built a better mousetrap, and that the underlying objective of promoting competition would be better served by the agency's approach than by continued regulation through filed rates. The Court ruled, however, that the ICC was not free to substitute its choices for those of Congress. Similarly, the Commission in the present case should be compelled to withhold price incentives from, and continue comprehensive NGA regulation of, old gas.

In the course of the Order No. 451 rulemaking proceeding, the Commission admitted that it lacked the authority simply to announce that all old gas prices would henceforth be set by the market. The Department of Justice ("DOJ") urged the Commission to declare that *any price* paid for gas subject to Sections 104 and 106 of the NGPA would be presumed "just and reasonable" within the meaning of the NGA. J.A. 170. The Commission agreed that "market-based rates" were desirable, but it concluded that the DOJ proposal was "beyond its authority." *Id.* at 170-171. The Commission conceded that "Congress did not intend to give the Commission authority to deregulate old gas prices completely . . . ," and

it purported to accept the D.C. Circuit's statement that "[i]f a decision is to be made to deregulate natural gas prices, it must be made by Congress, not by the [Commission] . . . ." *Public Service Commission v. FERC*, 589 F.2d 542, 550 (D.C. Cir. 1978), quoted at J.A. 171. The Commission then went ahead, however, and deregulated old gas.

By substantially increasing the ceiling price for old gas in an effort to encourage old gas prices to be determined by the market, the Commission abandoned "just and reasonable" ratemaking and ran directly counter to the decisions of this Court. As the Court recognized in *FPC v. Texaco*, 417 U.S. 380, 397 (1974), "the prevailing price in the market place cannot be the final measure of 'just and reasonable' rates mandated by the [NGA]." *See also Shell Oil Co. v. FPC*, 520 F.2d 1061, 1084 (5th Cir. 1975), *cert. denied*, 426 U.S. 941 (1976). The "just and reasonable" standard requires "meaningful rate regulation", and "presumed market forces may not comprise the principal regulatory constraint." *Farmers Union Central Exchange, Inc. v. FERC*, 734 F.2d 1486, 1507, 1530 (D.C. Cir.), *cert. denied*, 469 U.S. 1034 (1984).

Given the Commission's admission that the DOJ deregulation proposal was unlawful, the Commission's ultimate action in Order No. 451 is inexplicable. The Commission apparently believes that, although the *elimination* of a price ceiling would constitute improper deregulation, a price ceiling that has been set so high that it provides no meaningful price restraint *is* a proper exercise of its regulatory powers. *See* FERC Br. 34. This is not a legitimate distinction. As the Court has stated, a "price ceiling can only impose a direct legal restraint if the market price [is] above the price ceiling." *Martin Exploration*, 486 U.S. at 210. *See also Farmers Union Central Exchange, Inc. v. FERC*, *supra*, 734 F.2d at 1507 n.47 ("ratemaking that sets charges at levels 'seldom . . . reached in actual practice' and which is 'peripheral to

the pricing process' is at best a hair's breadth from total deregulation").[22]

Although the Commission attempts to persuade the Court that Sections 104(b)(2) and 106(c) of the NGPA authorized its deregulatory action, the Commission acknowledges that these provisions were added to the statute late in the legislative process (FERC Br. 38), and it cites no evidence that the purpose of the amendment was to grant the Commission sweeping authority to deregulate the very gas that Congress had chosen to keep regulated. That would have been an extraordinary development. It would have substantially changed, at the eleventh hour, the legislative compromise hammered out in 19 months of debate. It is inconceivable that Congress would have so changed the statute without providing some description and explanation of what it was doing.

By far the more plausible explanation is the one that the Commission itself embraced during the eight years after the NGPA was enacted: Sections 104(b)(2) and 106(c) were intended to modify the House bill, which made no provision for subsequent increases (other than adjustments for inflation) in the old gas price ceilings, and to provide a link to the NGA's "special relief" procedures. *See* pages 11-13, 38-39, *supra*. The point was that the existing NGA price ceilings applied generally to entire vintages of old gas. Although a particular ceiling might well have been "just and reasonable" for a vintage considered as a whole, it might have worked a hardship for a particular well, whose circumstances may have been

[22] In fact, to the extent that the GFN procedure enables producers of old gas to obtain prices above market levels, the effect of Order No. 451 is even worse than deregulation. This fact highlights the conflict between the Commission's Order and the NGPA. Throughout Congress' deliberations on the statute, "[t]he operating assumption . . . was that deregulation was the most favorable regime for gas producers under consideration." *Martin Exploration*, 486 U.S. at 210-211. As this Court emphasized just two years ago, "[n]ot one participant in the legislative process suggested that producers should receive higher prices than deregulation would afford them." *Id.* at 210.

different from those of most wells in the vintage. The NGA "special relief" procedures were intended to deal with that kind of situation, and Sections 104(b)(2) and 106(c) carried the concept over to the NGPA.[23] *See also Permian Basin*, 390 U.S. at 770-774.

In trying to bring Order No. 451 under the "just and reasonable" umbrella, petitioners make a series of involved, and sometimes inaccurate, arguments, about the Commission's historical practices in regulating gas rates. They concentrate extended attention on the history of vintaging and on the Commission's different cost methodologies in the rate-setting process. In the final analysis, however, none of these arguments can overcome the clear practical effect of Order No. 451, the "end result" that is dispositive under *Hope*. That "end result" is a sweeping deregulation of old gas prices, abandonments, and sales. It is not what Congress intended to permit under the "just and reasonable" provisions of the NGPA; it is not what Congress intended in excluding old gas from the Section 121 price decontrol provisions; and it is not what Congress intended in preserving NGA certificate and abandonment regulation for old gas.

III. THE AUTOMATIC ABANDONMENT PROVISIONS OF ORDER NO. 451 VIOLATE SECTION 7(b) OF THE NGA.

A. In Order No. 451, the Commission Broadly Disclaimed Its Regulatory Authority over Abandonment of "Old Gas" Facilities and Service.

The Commission did not confine its effort to deregulate old gas simply to price decontrol. In direct contravention

[23] Particularly in light of its own extended "special relief" rulemaking under Sections 104(b)(2) and 106(c), and its years of experience with the NGA "special relief" procedures, it is disingenuous in the extreme for the Commission now to claim to be unable to understand how a "just and reasonable" ceiling price for a particular vintage of old gas could ever become confiscatory. *See* FERC Br. 30. A vintage-wide ceiling price could preclude a producer from recovering its costs on a particular well, even while being a "just and reasonable" ceiling for the vintage generally.

of Section 601 of the NGPA, 15 U.S.C. § 3431, it also elected to cast aside Congress' decision to continue traditional NGA regulation over old gas. Among the important NGA controls specifically preserved by the NGPA are the abandonment requirements of Section 7(b), 15 U.S.C. § 717f(b). In Order No. 451, the Commission decided simply to discard these requirements, as unnecessary rituals of a bygone era.

Under Section 7(b) of the NGA, natural gas companies, such as producers making wholesale sales of old gas into the interstate market, are forbidden from abandoning facilities or service subject to the jurisdiction of the Commission without first obtaining the Commission's approval "after due hearing, and a finding by the Commission that the available supply of natural gas is depleted to the extent that service is unwarranted, or that the present or future public convenience or necessity permit such abandonment." 15 U.S.C. § 717f(b).

In Order No. 451, the Commission authorized pregranted abandonment for all future sales of old gas following release of such gas under the GFN procedure. J.A. 46. The breadth of the Commission's action appears clearly in the Order and is not disputed. Not only is the initial GFN abandonment automatically approved, but once an "old gas" service obligation has been abandoned under the GFN procedure, the gas involved is forever free of Section 7(b) requirements. This is true regardless of how many different customers may purchase the gas at different times in the future and regardless of what hardships discontinuance of serve to such customers may cause.

When the broad abandonment authorization is considered together with the blanket certificate that the Commission simultaneously provided for all future sales to new customers, there can be no reasonable doubt that the goal of Order No. 451 was to remove the remaining NGA controls from old gas and to relieve the Commission from the regulatory role it had always played under the statute.

B. Section 7(b) Is Intended to Ensure that Abandonment Can Occur Only after Interested Persons Have Had an Opportunity to Be Heard and the Commission Has Made Specific Findings.

This Court's decision in *United Gas Pipe Line v. McCombs*, 442 U.S. 529 (1979) (hereafter "*McCombs*"), makes clear that Congress entrusted the Commission with significant *mandatory* duties under Section 7(b). "Congress could not have been more explicit in establishing Commission approval as a prerequisite for lawful abandonment." *Id.* at 535-536. Noting that the express language of Section 7(b) not only "require[s] companies to obtain the 'approval of the Commission . . . after due hearing,' but . . . also prohibits abandonment absent specific findings by the Commission," the Court held that "[t]he language of Section 7(b) simply does not admit of any exception to the statutory procedure." *Id.*

The Court also ruled that the Commission's legal control over the continuation of service is "a *fundamental component of the regulatory scheme*," and that "[t]o deprive the Commission of this authority, *even in limited circumstances*, would *conflict with basic policies underlying the Act*." 442 U.S. at 538 (emphasis added). The Court explained that Section 7(b)'s "due hearing" requirement "permits all interested parties to be heard and therefore facilitates full presentation of the facts necessary to determine whether § 7(b)'s criteria have been met." *Id.* In the absence of an opportunity for factual inquiry into the merits of producer abandonments, the Court concluded, "the abandonment determination would rest, as a practical matter, *in the producer's control*, a result *clearly at odds with Congress' purpose* to regulate the supply and price of natural gas." *Id.* at 539 (emphasis added).

Enactment of the NGPA did not alter or diminish the regulatory mandate under Section 7(b), as applied to all old gas committed and dedicated to interstate commerce. *McCombs*, 442 U.S. at 536 n.9. Rather, the NGPA pre-

served the Commission's responsibilities under Section 7(b).

Petitioners do not contest this point. *See* FERC Br. 39; Producers Br. 32, 33. Instead, they claim that the Commission's across-the-board advance authorization of abandonment complies with the requirements of the statute. When Order No. 451 is measured against the standards and purpose of Section 7(b), however, it falls far short.

C. The Commission's Rulemaking Hearing on Order No. 451 Did Not Satisfy the "Due Hearing" and "Specific Findings" Requirements of Section 7(b).

Petitioners argue that the rulemaking proceeding conducted in connection with Order No. 451 satisfied the procedural requirements of Section 7(b). FERC Br. 42-44; Producers Br. 33, 35-42. They contend that the Commission only addressed "legislative-type" issues and not "historical fact" issues in the rulemaking and that therefore no further procedures are required for any future abandonment.

In fact, however, the Commission's own description of what it did in the Order No. 451 rulemaking confirms the deficiencies in the process. Under Section 7(b) the Commission may not restrict its attention exclusively to "legislative-type" issues applicable to the industry as a whole. It may not act, as it did in Order No. 451, solely on the basis of amorphous market generalizations, without any regard for specific, concrete examples of the actual impact of the abandonment procedures on particular services—services that, by definition, the Commission had previously certificated under Section 7(c) of the NGA as in the "public convenience and necessity." 15 U.S.C. § 717f(c).

Section 7(b), was not intended to address market generalities. It was designed to ensure that *all* interested parties—not just the immediate parties to the contract—would have an opportunity to be heard and to make a full

presentation of the facts before any abandonment could occur. *McCombs*, 442 U.S. at 538. The Commission's pre-grant of abandonment authority in Order No. 451 did not serve this statutory purpose.

By 1986, when the order was issued, many "old gas" service obligations had existed for many years. They were the very kinds of service arrangements that Congress sought to protect in Section 7(b), for the benefit of the broad class of consumers served by the interstate natural gas market. *See, e.g., McCombs*, 442 U.S. at 535-536, 538-539; *California v. Southland Realty Co.*, 436 U.S. 519, 526-527 (1978); *Sunray Mid-Continent Oil Co. v. FPC*, 364 U.S. 137, 142-143 (1960); *Coastal Oil & Gas Corp. v. FERC*, 782 F.2d 1249, 1252-1253 (5th Cir. 1986). Yet, the Commission, without hearing anything about the likely consequences of the abandonment of any of these obligations, authorized the abandonment of each and every one of them.

The Commission did not find, and indeed could not have found based on the record before it, that *every* future abandonment of old gas service would be consistent with the public convenience and necessity, taking into account the abandonment's probable effects on consumers and all other interested persons. Rather, the Commission found, at most, that in its view the public convenience and necessity would be better served if the Commission did not review future abandonments under Section 7(b) to determine whether they would satisfy the public convenience and necessity standard.

The Commission, in other words, used its authority to regulate to decide not to regulate. But that is not a position that the Commission could properly adopt. Congress made the choice that the Commission *should* review abandonments before they occur, and the Commission may not say in response, "it would be better if we didn't." *See Public Service Commission v. FPC*, 511 F.2d 338, 354 (D.C. Cir. 1975) ("There may be reason for the legislature to enact a deregulation for the natural gas industry,

but so long as it prescribes a system of regulation by an agency subject to court review[,] the courts may not abandon their responsibility by acquiescing in a charade or rubber stamping of non-regulation in agency trappings") (Leventhal, J.).

There is a further, related reason why the Order No. 451 automatic abandonment rule cannot be reconciled with the explicit requirements of Section 7(b). By authorizing literally thousands of abandonments on a permanent basis with no opportunity for Commission review of—or even passing notice of—the fundamental consumer interests affected by the abandonments (*see Atlantic Refining Co. v. Public Service Commission*, 360 U.S. 378, 388 (1959)), the Commission placed the entire abandonment decision squarely in the hands of the producer. This was the very vice that this Court found unacceptable in *McCombs*, 442 U.S. at 539 (placing the abandonment determination in the producer's control is "a result clearly at odds with Congress' purpose"). In ruling that Order No. 451 does not comport with the requirements of Section 7(b), the court of appeals correctly stressed this conflict between the order and the Court's rationale in *McCombs*. *See* Pet. App. 27a, 28a.

The Commission's shallow and distorted reading of Section 7(b) is epitomized by its attempt to reconcile its treatment of abandonments with the *McCombs* opinion. *See* FERC Br. 40 n.15. The Commission tries to distinguish Order No. 451 abandonment from that disapproved in *McCombs* on the ground that in *McCombs* the Commission had not approved the proposed abandonment, whereas under Order No. 451 the Commission has approved in advance all possible abandonments of old gas service. The Commission cannot satisfy its statutory responsibilities under Section 7(b), however, merely by making an express decision to *forever* disassociate itself from direct control over, or specific review of, countless potential abandonments of dedicated service, thus ensuring its ignorance of specific circumstances and equities. Whether or not the Commission characterizes that deci-

sion as "prior approval," it does not fulfill the Commission's regulatory obligation under Section 7(b).

D. The Commission Has Made No Provision for Individual Exceptions to Its Abandonment Rule.

Petitioners claim to find further support for their position that the Order No. 451 "hearing" satisfies the "due hearing" requirement of Section 7(b) in several decisions of this Court, including *Heckler v. Campbell*, 461 U.S. 458 (1983); *FPC v. Texaco*, 377 U.S., 33, 40 (1964); and *United States v. Storer Broadcasting Co.*, 351 U.S. 192 (1956). None of these cases, however, supports petitioners' claim. In each of the cases cited by petitioners, the determinative factor in the Court's decision to uphold an agency's use of general rulemaking, rather than case-by-case proceedings, was the agency's express provision of an opportunity for affected parties to demonstrate that the generalized regulation should *not* apply to them. That opportunity for specialized treatment, however, is wholly absent from the Commission's automatic abandonment rule contained in Order No. 451.

In *Heckler v. Campbell, supra*, this Court considered the question whether the Secretary of Health and Human Services could rely on published medical vocational guidelines to determine a claimant's right to social security benefits. The Court found that the Secretary could rely on such guidelines, but was quick to explain "that the regulations afford claimants ample opportunity both to present evidence relating to their own abilities and to offer evidence that the guidelines do not apply to them." 461 U.S. at 467. Similarly, the Court observed (461 U.S. at 467 n.11), the decisions in *FPC v. Texaco, supra*, and *United States v. Storer Broadcasting Co., supra*, "were careful to note that the statutory scheme at issue allowed an individual applicant to show that the rule promulgated should not be applied to him." *See also Permian Basin*, 390 U.S. at 770.

By contrast, the automatic abandonment rule provides no such opportunity. The best that petitioners are able

to say is that a person who objects to a proposed abandonment may complain that "the conditions specified in [Order No. 451] as prerequisites to receiving the Commission's approval are not present . . . ." FERC Br. 44; *see also* Producers Br. 41 n.21. But that, of course, fails to answer respondents' point. The concern is not that the Commission will approve an abandonment that does not comply with Order No. 451 (that problem is unlikely to arise, given the ease with which the order allows producers to abandon); rather, the concern is that abandonments *will* comply with Order No. 451 but *will not* serve the public convenience and necessity, in light of all the circumstances and equities involved. Order No. 451 provides no means of dealing with that kind of situation, and *Campbell*, *Texaco*, and *Storer* therefore provide no support for the Commission's automatic abandonment rule.

E. The Remaining Authorities on which Petitioners Rely Also Do Not Support Their Interpretation of Section 7(b).

Petitioners assert that various precedents of this Court and the federal courts of appeals justify advance approval of the abandonment of certificated services at the option of the producer, based not upon any individual circumstances, but solely upon generic policy findings. The cited cases hold otherwise.

For example, in *FPC v. Moss*, 424 U.S. 494 (1976), this Court only confirmed the authority of the Commission to grant both initial sales and abandonment authority at the time an individual natural gas sales certificate was granted. *Id.* at 496. The Court in *Moss* emphasized that the Commission had not sought to authorize any specific abandonment, but only to establish a procedure under which pre-granted abandonment "may be authorized in appropriate cases." *Id.* at 501. The Court noted, however, that any Commission orders approving the pre-granted abandonment would have to be supported by substantial evidence, consistent with Section 7(b), and subject to judicial review. *Id.* at 501-502.

Kansas Power & Light Co. v. FERC, 851 F.2d 1479 (D.C. Cir. 1988), affirming the Commission's policy of granting limited-term abandonments ("LTAs") in some circumstances, also provides no support for petitioners. That decision approved the issuance of LTAs filed on a pipeline-by-pipeline, or producer-by-producer basis, not a blanket, nationwide basis. Moreover, the LTAs were based on *mutual agreement* between pipelines and producers and were subject to strict controls. *See id.* at 1482 ("all the abandonment authorizations carried strict time (one year or less) limits, and producers were required to report periodically to the Commission on any sales made under the LTA program"). The court of appeals affirmed the Commission's denial of a hearing because under these circumstances any potential harm to consumers could be addressed in a prudence inquiry concerning the pipeline's decision voluntarily to agree to the LTA. The court concluded that the "allegations of possible future harm were too speculative to warrant a preauthorization adjudicative hearing and that any challenges to the LTAs would most logically be conducted in the pipelines' rate proceedings." *Id.* at 1484. The issue addressed in *Kansas Power & Light* was therefore completely different from that presented here.

Petitioners' reliance upon *Associated Gas Distributors v. FERC*, 824 F.2d 981 (D.C. Cir. 1987), *cert denied*, 485 U.S. 1006 (1988) (hereafter "*AGD*"), is also misplaced, for two reasons. First, the "pre-granted abandonment" at issue in that case can only occur at the election of the customer. Second, upon further judicial review of the same pre-granted abandonment regulations, in *American Gas Association v. FERC*, No. 87-1588 (D.C. Cir. Aug. 24, 1990), the D.C. Circuit clarified its prior ruling and remanded the issue to the Commission. Significantly, in defending these pre-granted abandonment provisions, the Commission had committed itself to considering on a case-by-case basis whether a deviation from the general rule was necessary, and the Commission had already determined that a factual inquiry was needed "to determine

whether a pipeline might be able to use its monopoly power to [local distribution companies'] detriment." Slip. op. at 42. Despite that "safety valve," the Court nonetheless remanded the pre-granted abandonment provisions, for the Commission to consider further whether the rule would adequately protect consumers. In stark contrast, Order No. 451 provides *no* opportunity for fact-specific inquiry into individual cases in which abandonment could harm not just the purchasing pipeline, but consumers and others as well.

Finally, petitioners rely on the revised abandonment standard announced in *Felmont Oil Corp.*, 33 F.E.R.C. ¶ 61,333, at 61,657 (1985), *rev'd on other grounds sub nom. Consolidated Edison Co. v. FERC*, 823 F.2d 630 (D.C. Cir. 1987). *Felmont* does not support the Commission's authority to make a generic policy determination that in all future cases the *permanent* release and abandonment of gas supplies will serve the public convenience and necessity. Instead, *Felmont* illustrates the need to provide a meaningful opportunity for a hearing in the individual circumstances of contested abandonments.

The Commission in *Felmont* announced "a shift in the identification of the public interest, from the interest of only specific customers to the interests of the market as a whole, and in the determination of how the public's needs are best served." 33 F.E.R.C. at 61,657. This "shift" did not dispense with the need for individual proceedings, however. *Felmont* retained the traditional factors considered by the Commission in evaluating abandonments, even though it broadened the definition of the public interest and the way in which those factors would be weighed.

> By adopting this new policy, the Commission does not reject the prior abandonment policies *in toto*. The list of factors which the Commission considered in the past, such as environmental and economic consequences of abandonment, the parties' contract arrangements, and the parties' comparative needs, will still be weighed.

33 F.E.R.C. ¶ 61,333 at p. 61,657.[24]

Taken together or separately, the cases cited by petitioners fail to support their position. Rather, they demonstrate the unprecedented nature of the Commission's action in Order No. 451 and thus tend to confirm the invalidity of that action under Section 7(b.).

IV. THE COURT OF APPEALS CORRECTLY DETERMINED THAT ORDERS NO. 451 AND NO. 451-A WERE FLAWED BECAUSE THEY EXACERBATED THE PROBLEM OF HIGH-COST TAKE-OR-PAY PROVISIONS.

The court of appeals found that among the many flaws in Order No. 451 was the Commission's failure to address the "take-or-pay" issue in a meaningful way. Although the Commission recognized that the problematical take-or-pay contracts could create significant difficulties for pipelines, the Commission nonetheless concluded that the "problem contracts are primarily a matter for resolution between the parties involved" (J.A. 68), and that "the natural forces of competition" would resolve the difficulties. *Id.*

The court of appeals concluded that this explanation was inadequate, finding that "the Commission's inaction on the take or pay problem is based on a rationale which is arbitrary and unsupportable." Pet. App. 32a. This conclusion was hardly surprising; at the time of the court's decision, the D.C. Circuit had already issued several opinions that specifically rejected the Commission's "*laissez-faire*" rationale and found it an inadequate re-

[24] The Commission also ruled in *Felmont* that appropriate conditions could be imposed on abandonments, on a case-by-case basis, "in order to mitigate the loss to the dedicated purchasers." 33 F.E.R.C. at 61,657. Order No. 451, of course, makes no provision for the imposition of any such conditions to ameliorate the effects of the automatic abandonments authorized in advance by the Commission.

sponse to the take-or-pay issue. *See AGD*, 824 F.2d at 1023; *Consolidated Edison Co. v. FERC, supra*, 823 F.2d at 639-642. The court of appeals simply agreed with the D.C. Circuit that the Commission's approach reflect[ed] questionable legal premises and fail[ed] to meet the requirement of 'reasoned decisionmaking.'" *AGD*, 824 F.2d at 1023, *quoted at* Pet. App. 31a.

The Commission points out that it now has taken steps to address the take-or-pay issue, in proceedings initiated after the issuance of Orders No. 451 and No. 451-A. FERC Br. 46 & n.18. And the D.C. Circuit has recently affirmed certain aspects of the regulatory procedures devised by the Commission in these subsequent proceedings. *See American Gas Association v. FERC*, No. 87-1588 (D.C. Cir. Aug. 24, 1990).[26] As the Commission admits, however, the D.C. Circuit has also invalidated "one of the Commission's central initiatives" designed "to reduce overall take-or-pay liabilities and to allocate take-or-pay costs equitably among all levels of the natural gas industry," thus creating new uncertainties concerning the take-or-pay issue. FERC Br. 46; *see Associated Gas Distributors v. FERC*, 893 F.2d 349 (D.C. Cir. 1989), *cert. pending*, No. 89-2016 (filed June 22, 1990).

In any event, these subsequent developments do not change the fact that the court below acted properly. The one tangible action taken by the Commission *in Order No. 451* to address the take-or-pay problem—the so-called "multi-vintage" provision in the GFN procedure—did not and could not provide effective take-or-pay relief. This is because approximately two-thirds of the contracts giving rise to the take-or-pay problem involved only new

[26] In the *American Gas Association* case, the D.C. Circuit affirmed the Commission's decision to provide pipelines with a means for offsetting outstanding take-or-pay liabilities with a producer any time the pipeline transports gas for the producer. The regulations implementing this decision, however, specifically prohibit a pipeline from receiving any relief based on its continued transportation of gas that was previously committed to the pipeline but was released under the GFN procedure of Order No. 451.

gas and thus were not covered by the multi-vintage provision, as the Commission itself admitted. J.A. 317, 320. Moreover, as the court of appeals correctly observed, only producers can initiate the GFN procedure, and they surely would not do so "if by so doing they ran the risk of giving up more on new gas contracts than they would receive in return for their old gas." Pet. App. 32a.

In response, petitioners claim that the court of appeals acted beyond its authority, because its opinion "appeared to require the Commission to address and solve the take-or-pay problem as a condition precedent to the lawful promulgation of Order No. 451." FERC Br. 45-46. *See also* Producers Br. 46. Petitioners argue that the court below has in effect "direct[ed] the Commission to reorder its regulatory priorities", by ordering it to solve the take-or-pay problem in the current proceedings, rather than in some other proceeding of the Commission's choosing. *See* FERC Br. 46, 48. Petitioners claim that this alleged directive violates the principles set forth in *Vermont Yankee Nuclear Power Corp. v. NRDC*, 435 U.S. 519 (1978), and *FPC v. Sunray DX Oil Co.*, 391 U.S. 9 (1968) (noting Commission's discretion to address take-or-pay in pipeline proceedings rather than producer proceedings).

Petitioners have greatly misstated the court of appeals' ruling. Nothing in the opinion below requires the Commission to find a "comprehensive" solution to the take-or-pay problem before it could "deal with the pricing of old gas." *See* Producers Br. 46. The court of appeals' determination was in fact more limited: the court simply concluded, in assessing the reasonableness of Order No. 451, that the Commission's new proposal for pricing old gas (in particular the GFN procedure) would exacerbate the take-or-pay problem. Because the Commission's justification for compounding this problem was "unsupportable," and because the orders had not otherwise attempted to mitigate the take-or-pay problem, the court concluded that the Commission's inaction was "regrettable and unwarranted." Pet. App. 31a. This

criticism, however, was plainly directed at the Commission's rationale for its orders—an issue that was squarely before the court—not at its failure to solve all relevant problems in a single proceeding.

Thus, there is no inconsistency between the decision below and *Vermont Yankee* or *Sunray DX Oil.* The court of appeals did not order the Commission to reorder its priorities, alter its procedures, or indeed take any action at all. *See Motor Vehicle Manufacturing Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 50 (1983) (*Vermont Yankee* is not a "talisman under which any agency decision is by definition unimpeachable").

The court of appeals' discussion of the take-or-pay issue, which is supported by substantial evidence, provides no basis for vacating the decision below. It simply provides an additional reason why Order No. 451 cannot be upheld.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted,

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APPENDICES

APPENDIX A

STATUTORY PROVISIONS INVOLVED

1. Title I of the Natural Gas Policy Act of 1978, as codified at 15 U.S.C. §§ 3311 *et seq.*, provides, in pertinent part:

TITLE I—WELLHEAD PRICING

Subtitle A—Wellhead Price Controls

Sec. 101. Inflation Adjustment; Other General Price Ceiling Rules.

(a) ANNUAL INFLATION ADJUSTMENT FACTOR.—

(1) GENERAL RULE.—For purposes of this title, the annual inflation adjustment factor applicable for any month shall be the sum of—

(A) a factor equal to one hundredth of the quarterly percent change in the GNP implicit price deflator; plus

(B) a correction factor of 1.002.

(2) QUARTERLY PERCENT CHANGE IN THE GNP IMPLICIT PRICE DEFLATOR.—For purposes of paragraph (1)—

(A) IN GENERAL.—The term "quarterly percent change in the GNP implicit price deflator", when used with respect to any month, means the quarterly percent change in the GNP implicit price deflator, computed and published as an annual rate by the Department of Commerce, for the most recent calendar quarter for which such quarterly percent change has been so published at least 8 days before the beginning of such month.

(B) MONTHS BEFORE ENACTMENT.—For purposes of applying such term with respect to any

month in any calendar quarter which ends before the date of the enactment of this Act and for which a quarterly percent change in the GNP implicit price deflator has been published by the Department of Commerce as of such date of enactment, the quarterly percent change in the GNP implicit price deflator for the calendar quarter in which such month occurs shall be used in lieu of the quarterly percent change in the GNP implicit price deflator for a preceding calendar quarter.

(3) GNP IMPLICIT PRICE DEFLATOR.—For purposes of paragraph (2)—

(A) IN GENERAL.—The term "GNP implicit price deflator" means, except as provided in subparagraph (B), the preliminary estimate of the implicit price deflator, seasonally adjusted, for the gross national product, as computed and published by the Department of Commerce for the calendar quarter involved.

(B) MOST RECENT DATA AVAILABLE ON ENACTMENT.—The most recent revision, if any, of such implicit price deflator which has been so published before the date of the enactment of this Act, shall be used in lieu of the preliminary estimate of such implicit price deflator.

(b) RULES OF GENERAL APPLICATION.—

(1) DEPTH.—Except where otherwise provided, the depth of the completion location of any well shall be the true vertical depth, measured from the surface location of the well.

(2) COMMERCIAL QUANTITIES.—In determining whether production of natural gas has occurred in commercial quantities, quantities of natural gas produced from a well and used for the testing of such

well or for other field uses which are production related shall not be taken into account.

(3) COMPUTATION OF MONTHLY EQUIVALENT.—For purposes of computing any price under this title, the monthly equivalent of any factor shall be the twelfth root of such factor.

(4) APPLICATION OF CEILING PRICES.—The maximum lawful ceiling prices under this title—

(A) shall only apply to natural gas produced in the United States;

(B) shall apply to the month of delivery without regard to the date of the sale or the date of the contract under which the sale occurs; and

(C) shall not apply to deliveries occurring before the first day of the first month beginning after the date of the enactment of this Act.

(5) SALES QUALIFYING UNDER MORE THAN ONE PROVISION.—If any natural gas qualifies under more than one provision of this title providing for any maximum lawful price or for any exemption from such a price with respect to any first sale of such natural gas, the provision which could result in the highest price shall be applicable.

(6) COMPUTATION AND PUBLICATION OF CEILING PRICES.—The Commission shall—

(A) not later than 5 days before the beginning of any month, compute and make available the maximum lawful prices prescribed under this title for such month and the monthly equivalent of the annual inflation adjustment factor for such month, and

(B) as soon as possible thereafter, publish such maximum lawful prices and such factor for such month in the Federal Register.

(7) ROUNDING.—Any maximum lawful price under this title shall be computed to the nearest mill (rounding any fraction thereof which is one-half a mill or higher to the next highest mill).

(8) COMPUTATION OF INITIAL CEILING PRICES.—In computing any maximum lawful price under the provisions of this title for the first month for which such provisions take effect, if the initial maximum lawful price is established by reference to any month before such month, such maximum lawful price shall be computed as if such provisions had been in effect during each such prior month.

(9) EFFECT ON CONTRACT PRICE.—In the case of—

(A) any price which is established under any contract for the first sale of natural gas and which does not exceed the applicable maximum lawful price under this title, or

(B) any price which is established under any contract for the first sale of natural gas which is exempted under subtitle B of this title from the application of a maximum lawful price under this title,

such maximum lawful price, or such exemption from such a maximum lawful price, shall not supersede or nullify the effectiveness of the price established under such contract.

Sec. 102. Ceiling Price for New Natural Gas and Certain Natural Gas Produced from the Outer Continental Shelf.

(a) APPLICATION.—The maximum lawful price computed under subsection (b) shall apply to any first sale of natural gas delivered during any month in the case of—

(1) new natural gas; and

(2) natural gas produced from any old lease on the Outer Continental Shelf and qualifying under subsection (d) for the new natural gas ceiling price.

(b) MAXIMUM LAWFUL PRICE.—The maximum lawful price under this section for any month shall be—

(1) $1.75 per million Btu's, in the case of April 1977; and

(2) in the case of any month thereafter, the maximum lawful price, per million Btu's, prescribed under this subsection for the preceding month multiplied by the monthly equivalent of a factor equal to the sum of—

(A) the annual inflation adjustment factor applicable for such month; plus

(B) (i) .035, in the case of any month beginning before April 20, 1981; or

(ii) .04, in the case of any month beginning after April 20, 1981.

(c) DEFINITION OF NEW NATURAL GAS.—

(1) GENERAL RULE.—For the purposes of this section, the term "new natural gas" means each of the following categories of natural gas:

(A) NEW OCS LEASES.—Natural gas determined in accordance with section 503 to be produced from a new lease on the Outer Continental Shelf.

(B) NEW ONSHORE WELLS.—Natural gas determined in accordance with section 503 to be produced (other than from the Outer Continental Shelf) from—

(i) any new well which is 2.5 miles or more (determined in accordance with paragraph (2)) from the nearest marker well; or

(ii) any completion location, of any new well, which is located at a depth at least 1,000 feet below the deepest completion location of each marker well within 2.5 miles (determined in accordance with paragraph (2)) of such new well.

(C) NEW ONSHORE RESERVOIRS.—

(i) GENERAL RULE.—Except as provided in clauses (ii) and (iii), natural gas determined in accordance with section 503 to be produced (other than from the Outer Continental Shelf) from a reservoir from which natural gas was not produced in commercial quantities before April 20, 1977.

(ii) BEHIND-THE-PIPE EXCLUSION.—Clause (i) shall not not apply to natural gas produced from any reservoir if—

(I) the reservoir was penetrated before April 20, 1977, by an old well from which natural gas or crude oil was produced in commercial quantities (whether or not such production was from such reservoir); and

(II) natural gas could have been produced in commercial quantities from such reservoir through such old well before April 20, 1977.

(iii) WITHHELD GAS EXCLUSION.—Clause (i) shall not apply to natural gas produced from any reservoir—

(I) if such natural gas is produced through an old well; and

(II) subject to clause (iv), suitable facilities for the production and delivery to a pipeline of such natural gas were in existence on April 20, 1977.

(iv) EMERGENCY SALE FACILITIES.—The criteria of clause (iii) (II) shall not be considered to be met by reason of the existence of production and delivery facilities which were installed to carry out sales and deliveries of natural gas—

(I) under section 6 of the Emergency Natural Gas Act of 1977; or

(II) under the emergency sale authority pursuant to Opinion 699-B issued by the Federal Power Commission under section 7(c) of the Natural Gas Act.

(2) DETERMINATIONS OF DISTANCE.—For purposes of determining distance from any new well to any marker well—

(A) SURFACE LOCATION TO SURFACE LOCATION.—The measurement shall be the horizontal distance from the surface location of the new well to the surface location of the marker well—

(i) in any case in which the new well meets requirements for the nondirectional drilling of wells prescribed by the appropriate State or Federal agency having regulatory jurisdiction over the drilling of such well; or

(ii) in any case in which—

(I) the surface drilling of such new well began on or after February 19, 1977;

(II) production of natural gas in commercial quantities began from such

well before the date of the enactment of this Act; and

(III) the drilling of such well was not subject to any requirement regarding directional or nondirectional drilling, or the drilling of such well was subject to requirements regarding directional drilling but such requirements did not necessitate the obtaining of any permit or other certificate before drilling began.

(B) COMPLETION LOCATION TO SURFACE LOCATION.—In the case of any new well which is not covered by subparagraph (A), the measurements shall be the horizonal distance from—

(i) the closest point of any completion location of the new well, vertically projected to the same elevation as the surface location of the nearest marker well; to

(ii) the surface location of such marker well.

(3) DETERMINATION OF COMMERCIAL QUANTITIES.—For purposes of determining whether production of natural gas has occurred in commercial quantities under paragraph (1)(C)—

(A) a rebuttable presumption exists that production from a reservoir in commercial quantities has not occurred if natural gas has not been sold and delivered from such reservoir before April 20, 1977; and

(B) quantities of natural gas sold in interstate commerce (within the meaning of the Natural Gas Act) shall not be taken into account if such quantities were sold before the date of the enactment of this Act—

(i) under section 6 of the Emergency Natural Gas Act of 1977; or

(ii) under the emergency sale authority pursuant to Opinion 699-B issued by the Federal Power Commission under section 7(c) of the Natural Gas Act.

(4) NEW WELLS WHICH ARE ALSO MARKER WELLS.—For purposes of applying paragraph (c)(1)(B)(ii) in the case of any marker well which is also a new well under section 2(3)(B), the reference in such paragraph (c)(1)(B)(ii) to the deepest completion location of any marker well shall be deemed to be a reference to any subsurface location from which natural gas was produced in commercial quantities after January 1, 1970, and before February 19, 1977.

(d) OCS GAS QUALIFYING FOR NEW NATURAL GAS CEILING PRICE.—For purposes of this section—

(1) OCS RESERVOIRS DISCOVERED ON OR AFTER JULY 27, 1976.—Natural gas determined in accordance with section 503 to be produced from an old lease on the Outer Continental Shelf shall qualify for the new natural gas ceiling price if such natural gas is produced from a reservoir which was not discovered before July 27, 1976.

(2) RESERVOIRS PENETRATED BEFORE JULY 27, 1976.—For purposes of paragraph (1), a reservoir shall be considered as having been discovered before July 27, 1976, if—

(A) such reservoir was penetrated by a well before July 27, 1976; and

(B) with respect to such well—

(i) the results of any production test meeting the requirements of OCS Order No. 4 demonstrate that, as of the time of such

test, the reservoir is capable of producing in paying quantities (within the meaning of such Order);

(ii) any production capability evidence meeting the requirements of OCS Order No. 4 demonstrates that, as of the time such evidence is obtained, the reservoir is capable of producing in paying quantities (within the meaning of such Order); or

(iii) subject to paragraph (3), an induction-electric log, sidewall cores and core analysis, or a wire line formation test indicates that, as of the time of such test, the reservoir is commercially producible.

(3) EFFECT OF NEGATIVE PRODUCTION CAPABILITY TESTS.—For purposes of paragraph (1), a reservoir shall not be considered as having been discovered before July 27, 1976, by the penetration of such reservoir by a well before July 27, 1976, if, with respect to such well—

(A) a production test meeting the requirements of OCS Order No. 4 was performed and the results of such test fail to demonstrate that, as of the time of such test, such reservoir was capable of producing in paying quantities (within the meaning of such Order); and

(B) production capability evidence meeting the requirements of OCS Order No. 4 does not exist or, if existing, does not demonstrate that, as of the date such evidence was obtained, such reservoir was capable of producing in paying quantities (within the meaning of such Order).

(4) BURDEN OF PROOF.—For purposes of paragraph (1), the producer shall have the burden of showing that—

(A) no test described in paragraph (2)(B)(i) or (iii) was performed and no evidence described in paragraph (2)(B)(ii) or (iii) exists; or

(B) if any such test was performed or such evidence exists, the results of such test or such evidence do not provide the applicable demonstration or indication specified under paragraph (2).

(5) DEFINITION OF OCS ORDER NO. 4.—For purposes of this subsection, the term "OCS Order No. 4" means the order numbered 4 of the Conservation Division, Geological Survey, Department of the Interior, as approved by the Chief of the Conservation Division on August 28, 1969.

(e) EXCLUSION OF CERTAIN ALASKA NATURAL GAS.—The preceding provisions of this section shall not apply to any natural gas produced from the Prudhoe Bay Unit of Alaska and transported through the natural gas transportation system approved under the Alaska Natural Gas Transportation Act of 1976.

Sec. 103. Ceiling Price for New, Onshore Production Wells.

(a) APPLICATION.—In the case of natural gas determined in accordance with section 503 to be produced from any new, onshore production well, the maximum lawful price computed under subsection (b) shall apply to any first sale of such natural gas delivered during any month.

(b) MAXIMUM LAWFUL PRICE.—

(1) GENERAL RULE.—The maximum lawful price under this section for any month shall be—

(A) \$1.75 per million Btu's, in the case of April 1977; and

(B) in the case of any month thereafter, the maximum lawful price, per million Btu's prescribed under this paragraph for the preceding month multiplied by the monthly equivalent of the annual inflation adjustment factor applicable for such month.

(2) PRODUCTION AFTER 1984 FROM WELLS 5,000 FEET OR LESS IN DEPTH.—Effective beginning with the month of January 1985 and in any month thereafter, in the case of any first sale of natural gas which was not committed or dedicated to interstate commerce on April 20, 1977, and which is produced from a new, onshore production well from a completion location located at a depth of 5,000 feet or less, the maximum lawful price under this section for any such natural gas delivered during any month shall be a price which is midway between—

(A) the maximum lawful price, per million Btu's, computed for such month under section 102 (relating to new natural gas); and

(B) the maximum lawful price, per million Btu's, computed for such month under paragraph (1).

(c) DEFINITION OF NEW, ONSHORE PRODUCTION WELL.—For purposes of this section, the term "new, onshore production well" means any new well (other than a well located on the Outer Continental Shelf)—

(1) the surface drilling of which began on or after February 19, 1977;

(2) which satisfies applicable Federal or State well-spacing requirements, if any; and

(3) which is not within a proration unit—

(A) which was in existence at the time the surface drilling of such well began;

(B) which was applicable to the reservoir from which such natural gas is produced; and

(C) which applied to a well (i) which produced natural gas in commercial quantities or (ii) the surface drilling of which was begun before February 19, 1977, and which was thereafter capable of producing natural gas in commercial quantities.

(d) EXCLUSION OF CERTAIN ALASKA NATURAL GAS.—The preceding provisions of this section shall not apply to any natural gas produced from the Prudhoe Bay Unit of Alaska and transported through the natural gas transportation system approved under the Alaska Natural Gas Transportation Act of 1976.

Sec. 104. Ceiling Price for Sales of Natural Gas Dedicated to Interstate Commerce.

(a) APPLICATION.—In the case of natural gas committed or dedicated to interstate commerce on the day before the date of the enactment of this Act and for which a just and reasonable rate under the Natural Gas Act was in effect on such date for the first sale of such natural gas, the maximum lawful price computed under subsection (b) shall apply to any first sale of such natural gas delivered during any month.

(b) MAXIMUM LAWFUL PRICE.—

(1) GENERAL RULE.—The maximum lawful price under this section for any month shall be the higher of—

(A)(i) the just and reasonable rate, per million Btu's, established by the Commission which was (or would have been) applicable to the first sale of such natural gas on April 20, 1977, in the case of April 1977; and

(ii) in the case of any month thereafter, the maximum lawful price, per million Btu's, prescribed under this subparagraph for the preceding month multiplied by the monthly equivalent of the annual inflation adjustment factor applicable for such month, or

(B) any just and reasonable rate which was established by the Commission after April 27, 1977, and before the date of the enactment of this Act and which is applicable to such natural gas.

(2) CEILING PRICES MAY BE INCREASED IF JUST AND REASONABLE.—The Commission may, by rule or order, prescribe a maximum lawful ceiling price, applicable to any first sale of any natural gas (or category thereof, as determined by the Commission) otherwise subject to the preceding provisions of this section, if such price is—

(A) higher than the maximum lawful price which would otherwise be applicable under such provisions; and

(B) just and reasonable within the meaning of the Natural Gas Act.

Sec. 105. Ceiling Price for Sales Under Existing Intrastate Contracts.

(a) APPLICATION.—The maximum lawful price computed under subsection (b) shall apply to any first sale of natural gas delivered during any month in the case of natural gas, sold under any existing contract or any successor to an existing contract, which was not committed or dedicated to interstate commerce on the day before the date of the enactment of this Act.

(b) MAXIMUM LAWFUL PRICE.—

(1) GENERAL RULE.—Subject to paragraphs (2) and (3), the maximum lawful price under this section shall be the lower of—

(A) the price under the terms of the existing contract, to which such natural gas was subject on the date of the enactment of this Act, as such contract was in effect on such date; or

(B) the maximum lawful price, per million Btu's, computed for such month under section 102 (relating to new natural gas).

(2) CONTRACT PRICE EXCEEDING NEW GAS CEILING PRICE ON ENACTMENT.—In the case of any natural gas described in subsection (a) for which the contract price applicable on the date of the enactment of this Act exceeds the maximum lawful price, per million Btu's, computed for such date under section 102 (relating to new natural gas), the maximum lawful price under this section shall be the higher of—

(A) the maximum lawful price, per million Btu's, computed for such month under section 102; or

(B)(i) the contract price on the date of the enactment of this Act, in the case of the month in which this Act is enacted; and

(ii) in the case of any month thereafter, the maximum lawful price, per million Btu's, prescribed under this subparagraph for the preceding month multiplied by the monthly equivalent of the annual inflation adjustment factor applicable for such month.

(3) PRICE INCREASES RESULTING FROM INDEFINITE PRICE ESCALATOR CLAUSES.—

(A) IN GENERAL.—Effective January 1985, and each month thereafter, in the case of any first sale of natural gas, which is sold at a price established under any indefinite price escalator clause of any existing contract or successor to an existing contract and for which the contract price on December 31, 1984, is higher than $1.00 per million Btu's, the maximum lawful price under this section for any such natural gas delivered during any month shall be the higher of—

(i) the maximum lawful price, per million Btu's, computed under paragraph (2) (B); or

(ii) (I) In the case of January 1985, the maximum lawful price, per million Btu's, computed under section 102 (relating to new natural gas) for such month; and

(II) in the case of any month thereafter, the maximum lawful price, per million Btu's, prescribed under this clause for the immediately preceding month multiplied by the monthly equivalent of the sum of a factor equal to the annual inflation adjustment factor applicable for such month plus .03.

(B) DEFINITION OF INDEFINITE PRICE ESCALATOR CLAUSE.—For purposes of this paragraph, the term "indefinite price escalator clause" includes any provision of any contract—

(i) which provides for the establishment or adjustment of the price for natural gas delivered under such contract by reference to other prices for natural gas, for crude oil, or for refined petroleum products; or

(ii) which allows for the establishment or adjustment of the price of natural gas

delivered under such contract by negotiation between the parties.

(C) CONTRACT MODIFICATIONS AFTER MAY 3, 1978, TO BE DISREGARDED.—In the case of any natural gas which was subject to any contract on May 3, 1978, that contained an indefinite price escalator clause on such date, no amendment to or modification of the operation of such contract made after such date may have the effect of limiting or precluding the application of this paragraph on or after January 1, 1985, to prices allowed with respect to such natural gas.

(D) EXCLUSION.—Subparagraph (A) shall not apply to any first sale of new natural gas (as defined in section 102(c)), stripper well natural gas (as defined in section 108(b)), high-cost natural gas (as defined in section 107 (c)), natural gas produced from a new, onshore production well (as defined in section 103 (c)) from a completion location located at a depth of more than 5,000 feet, and, beginning July 1, 1987, or, if later, the date of expiration of any price controls reimposed under section 122, natural gas produced from any new, onshore production well (as defined in section 103 (c)) from a completion location located at a depth of 5,000 feet or less.

(c) DEFINITION OF CONTRACT PRICE.—For purposes of this section, the term "contract price", when used with respect to any specific date, means—

(1) the price paid, per million Btu's, under a contract for deliveries of natural gas occurring on such date; or

(2) if no deliveries of natural gas occurred under such contract on such date, the price, per million

Btu's, that would have been paid had such deliveries occurred on such date.

Sec. 106. Ceiling Price for Sales Under Rollover Contracts.

(a) INTERSTATE ROLLOVER CONTRACTS.—In the case of any first sale under any rollover contract of natural gas which was committed or dedicated to interstate commerce on the day before the date of the enactment of this Act, the maximum lawful price under this subsection for such natural gas delivered during any month shall be the higher of—

(1) (A) in the case of the month in which the effective date of such rollover contract occurs, the just and reasonable rate, if any, per million Btu's, established by the Commission and applicable on such date to the natural gas subject to the expired contract; and

(B) in the case of any month thereafter, the maximum lawful price, per million Btu's, prescribed under this paragraph for the preceding month multiplied by the monthly equivalent of the annual inflation adjustment factor applicable for such month; or

(2) (A) $0.54 per million Btu's, in the case of April 1977; and

(B) in the case of any month thereafter, the maximum lawful price, per million Btu's, prescribed under this paragraph for the preceding month multiplied by the monthly equivalent of the annual inflation adjustment factor applicable for such month. For purposes of this subsection, the term "rollover contract" includes any contract which would have been a rollover contract but for the fact that the expiration of the previous contract occurred prior

to the day before the date of the enactment of this Act.

(b) INTRASTATE ROLLOVER CONTRACTS.—

(1) GENERAL RULE.—In the case of any first sale under any rollover contract of natural gas which was not committed or dedicated to interstate commerce on the day before the date of the enactment of this Act, the maximum lawful price under this subsection for such natural gas delivered during any month shall be the higher of—

(A) (i) the maximum price paid under the expired contract, per million Btu's, in the case of the month in which the effective date of such rollover contract occurs; and

(ii) in the case of any month thereafter, the maximum lawful price, per million Btu's, prescribed under this subparagraph for the preceding month multiplied by the monthly equivalent of the annual inflation adjustment factor applicable for such month; or

(B) (i) $1.00 per million Btu's, in the case of April 1977; and

(ii) in the case of any month thereafter, the maximum lawful price, per million Btu's, prescribed under this subparagraph for the preceding month multiplied by the monthly equivalent of the annual inflation adjustment factor applicable for such month.

(2) CERTAIN STATE OR INDIAN PRODUCTION OR ROYALTY SHARES.—

(A) GENERAL RULE.—In the case of any first sale under any rollover contract of natural gas which was not committed or dedicated to interstate commerce on the day before the date of the enactment of this Act and which constitutes a

State government's or Indian tribes natural gas production, or royalty share or other interest (as of such day) in natural gas production, from real property (including subsurface mineral interest) owned on the date of the enactment of this Act by such State government or Indian tribe (as the case may be), the maximum lawful price under this subsection for any such natural gas delivered during any month shall be the maximum lawful price, per million Btu's, computed for such month under section 102 (relating to new natural gas).

(B) INDIAN TRIBAL LANDS.—For purposes of this paragraph, land shall be considered to be owned by an Indian tribe only if—

(i) such land is owned directly by such tribe; or

(ii) such land is held by the United States or any State in trust for Indian persons and is located within the boundaries of an Indian reservation (as such boundaries were in effect on the date of the enactment of this Act).

(C) DEFINITIONS.—For purposes of this paragraph—

(i) STATE GOVERNMENT.—The term "State government" means any State or any agency, instrumentality, or political subdivision of a State.

(ii) INDIAN TRIBE.—The term "Indian tribe" means any Indian tribe recognized as eligible for services provided by the Secretary of the Interior to Indians.

(c) CEILING PRICES MAY BE INCREASED IF JUST AND REASONABLE.—The Commission may, by rule or order, prescribe a maximum lawful price, applicable to any first sale of any natural gas (or category thereof, as determined by the Commission) otherwise subject to the preceding provisions of this section, if such price is—

(1) higher than the maximum lawful price which would otherwise be applicable under such provisions; and

(2) just and reasonable within the meaning of the Natural Gas Act.

Sec. 107. Ceiling Price for High-Cost Natural Gas.

(a) WELLS COMPLETED BELOW 15,000 FEET.—In the case of any first sale of high-cost natural gas produced from any well the surface drilling of which began on or after February 19, 1977, if such production is from any completion location which is located at a depth of more than 15,000 feet, the maximum lawful price under this section for such natural gas delivered during any month shall be the maximum lawful price, per million Btu's, computed for such month under section 102 (relating to new natural gas).

(b) COMMISSION AUTHORITY TO PRESCRIBE HIGHER INCENTIVE PRICES.—The Commission may, by rule or order, prescribe a maximum lawful price, applicable to any first sale of any high-cost natural gas, which exceeds the otherwise applicable maximum lawful price to the extent that such special price is necessary to provide reasonable incentives for the production of such high-cost natural gas.

(c) DEFINITION OF HIGH-COST NATURAL GAS.—For purposes of this section, the term "high-cost natural gas" means natural gas determined in accordance with section 503 to be—

(1) produced from any well the surface drilling of which began on or after February 19, 1977, if such production is from a completion location which is located at a depth of more than 15,000 feet;

(2) produced from geopressured brine;

(3) occluded natural gas produced from coal seams;

(4) produced from Devonian shale; and

(5) produced under such other conditions as the Commission determines to present extraordinary risks or costs.

(d) PROVISIONS FOR HIGH-COST NATURAL GAS TO BE ELECTIVE.—If any credit, exemption, deduction, or comparable adjustment applicable ot the computation of any Federal tax is specifically allowable with respect to any high-cost natural gas (or category thereof) under any provision of law enacted after the date of the enactment of this Act, the provisions of subsections (a) and (b) of this section and the provisions of subtitle B shall not apply to such natural gas produced from any well unless an election to have such provisions apply (in lieu of such credit, exemption, deduction, or adjustment) with respect to such natural gas produced from such well is filed with the Commission on or before the later of—

(A) the 30th day after the date of the enactment of the Act under which such credit, exemption, deduction, or adjustment is provided; or

(B) the date the surface drilling of such well began.

Sec. 108. Ceiling Price for Stripper Well Natural Gas.

(a) GENERAL RULE.—In the case of any first sale of stripper well natural gas the maximum lawful price under this section for such natural gas delivered during any month shall be—

(1) $2.09 per million Btu's, in the case of May 1978; and

(2) in the case of any month thereafter, the maximum lawful price, per million Btu's, prescribed under this subsection for the preceding month multiplied by the monthly equivalent of a factor equal to the sum of—

(A) the annual inflation adjustment factor applicable for such month; plus

(B)(i) .035, in the case of any month beginning before April 20, 1981; or

(ii) .04, in the case of any month beginning after April 20, 1981.

(b) DEFINITION OF STRIPPER WELL NATURAL GAS.—

(1) GENERAL RULE.—Except as provided in paragraph (2), the term "stripper well natural gas" means natural gas determined in accordance with section 503 to be nonassociated natural gas produced during any month from a well if—

(A) during the preceding 90-day production period, such well produced nonassociated natural gas at a rate which did not exceed an average of 60 Mcf per production day during such period; and

(B) during such period such well produced at its maximum efficient rate of flow, determined in accordance with recognized conservation practices designed to maximize the ultimate recovery of natural gas.

(2) PRODUCTION IN EXCESS OF 60 MCF.—The Commission shall, by rule, provide that, if nonassociated natural gas produced from a well which previously qualified as a stripper well under paragraph (1) exceeds an average of 60 Mcf per production day during any 90-day production period, such natural gas may continue to qualify as stripper well natural gas if the increase in nonassociated natural gas produced from such well was the result of the application of recognized enhanced recovery techniques.

(3) DEFINITIONS.—For purposes of this subsection—

(A) PRODUCTION DAY.—The term "production day" means—

(i) any day during which natural gas is produced; and

(ii) any day during which natural gas is not produced if production during such day is prohibited by a requirement of State law or a conservation practice recognized or approved by the State agency having regulatory jurisdiction over the production of natural gas.

(B) 90-DAY PRODUCTION PERIOD.—The term "90-day production period" means any period of 90 consecutive calendar days excluding any day during which natural gas is not produced for reasons other than voluntary action of any person with the right to control production of natural gas from such well.

(C) NONASSOCIATED NATURAL GAS.—The term "nonassociated natural gas" means natural gas which is not produced in association with crude oil.

Sec. 109. Ceiling Price for Other Categories of Natural Gas.

(a) APPLICATION.—The maximum lawful price computed under subsection (b) shall apply to any first sale of any natural gas delivered during any month, in the case of any natural gas which is not covered by any maximum lawful price under any other section of this subtitle, including—

(1) natural gas produced from any new well not otherwise qualifying for a higher maximum lawful price under this title;

(2) natural gas committed or dedicated to interstate commerce on the day before the date of the enactment of this Act and for which a just and reasonable rate under the Natural Gas Act was not in effect on such date for the first sale of such natural gas;

(3) natural gas which was not committed or dedicated to interstate commerce on the day before the date of the enactment of this Act and which was not subject to an existing contract on such day; and

(4) natural gas produced from the Prudhoe Bay Unit of Alaska and transported through the natural gas transportation system approved under the Alaska Natural Gas Transportation Act of 1976.

(b) MAXIMUM LAWFUL PRICE.—

(1) The maximum lawful price under this section for any month shall be—

(A) $1.45 per million Btu's, in the case of April 1977; and

(B) in the case of any month thereafter, the maximum lawful price, per million Btu's, prescribed under this paragraph for the preceding month multiplied by the monthly equivalent of the annual inflation adjustment factor applicable for such month.

(2) CEILING PRICES MAY BE INCREASED IF JUST AND REASONABLE.—The Commission may, by rule or order, prescribe a maximum lawful ceiling price, applicable to any first sale of any natural gas (or category thereof, as determined by the Commission) otherwise subject to the preceding provisions of this section, if such price is—

(A) higher than the maximum lawful price which would otherwise be applicable under such provisions; and

(B) just and reasonable within the meaning of the Natural Gas Act.

Sec. 110. Treatment of State Severance Taxes and Certain Production-Related Costs.

(a) ALLOWANCE FOR STATE SEVERANCE TAXES AND CERTAIN PRODUCTION-RELATED COSTS.—Except as provided in subsection (b), a price for the first sale of natural gas shall not be considered to exceed the maximum lawful price applicable to the first sale of such natural gas under this subtitle if such first sale price exceeds the maximum lawful price to the extent necessary to recover—

(1) State severance taxes attributable to the production of such natural gas and borne by the seller, but only to the extent the amount of such taxes does not exceed the limitation of subsection (b); and

(2) any costs of compressing, gathering, processing, treating, liquefying, or transporting such natural gas, or other similar costs, borne by the seller and allowed for, by rule or order, by the Commission.

(b) LIMITATION ON STATE SEVERANCE TAXES.—The State severance tax allowable under subsection (a)(1) with respect to the production of any natural gas may not include any amount of State severance taxes borne by the seller which results from a provision of State law enacted on or after December 1, 1977, unless such provision of law is equally applicable to natural gas produced in such State and delivered in interstate commerce and to natural gas produced in such State and not so delivered.

(c) DEFINITION OF STATE SEVERANCE TAX.—For purposes of this section, the term "State severance tax" means any severance, production, or similar tax, fee, or other levy imposed on the production of natural gas—

(1) by any State or Indian tribe (as defined in section 106(b)(2)(B)(ii)); and

(2) by any political subdivision of a State if the authority to impose such tax, fee, or other levy is granted to such political subdivision under State law.

Subtitle B—Decontrol of Certain Natural Gas Prices

Sec. 121. Elimination of Price Controls for Certain Natural Gas Sales.

(a) GENERAL RULE.—Subject to the reimposition of price controls as provided in section 122, the provisions of subtitle A respecting the maximum lawful price for the first sale of each of the following categories of natural gas shall, except as provided in subsections (d) and (e), cease to apply effective January 1, 1985:

(1) NEW NATURAL GAS.—New natural gas (as defined in section 102(c)).

(2) NEW, ONSHORE PRODUCTION WELLS.—Natural gas produced from any new, onshore production well (as defined in section 103(c), if such natural gas—

(A) was not committed or dedicated to interstate commerce on April 20, 1977; and

(B) is produced from a completion location which is located at a depth of more than 5,000 feet.

(3) INTRASTATE CONTRACTS IN EXCESS OF $1.00.—Natural gas sold under an existing contract, any successor to an existing contract, or any rollover contract, if—

(A) such natural gas was not committed or dedicated to interstate commerce on the day before the date of the enactment of this Act; and

(B) the price paid for the last deliveries of such natural gas occurring on December 31,

1984, or, if no deliveries occurred on such date, the price would have been paid had deliveries occurred on such date is higher than $1.00 per million Btu's.

(b) HIGH-COST NATURAL GAS.—Effective beginning on the effective date of the incremental price rule required under section 201, the provisions of subtitle A respecting the maximum lawful price for the first sale of natural gas shall cease to apply to the first sale of high-cost natural gas which is described in section 107(c) (1), (2), (3), or (4).

(c) NATURAL GAS PRODUCED FROM 5,000 OR LESS.—Effective beginning July 1, 1987, or, if later, the date of expiration of any price controls reimposed under section 122, the provisions of subtitle A respecting the maximum lawful price for any first sale of natural gas shall, except as provided in subsection (d), cease to apply to any first sale of natural gas produced from any new, onshore production well (as defined in section 103(c)), if such natural gas—

(1) was not committed or dedicated to interstate commerce on April 20, 1977; and

(2) is produced from a completion location which is located at a depth of 5,000 feet or less.

(d) EXCLUSION OF CERTAIN ALASKA NATURAL GAS.—The provisions of subsections (a) and (c) shall not apply to any natural gas produced from the Prudhoe Bay Unit of Alaska and transported through the natural gas transportation system approved under the Alaska Natural Gas Transportation Act of 1976.

(e) LIMITATION ON INDEFINITE PRICE ESCALATORS.—Natural gas which is not subject to maximum lawful prices under subtitle A solely by reason of subsection (a)(3) and which is sold under any existing contract or successor to an existing contract at a price established

under an indefinite price escalator clause (as defined in section 105(b)(3)(B)) shall be subject to the provisions of section 105(b)(3).

2. Section 503 of the Natural Gas Policy Act, as codified at 15 U.S.C. § 3413, provides:

Sec. 503. Determinations for Qualifying Under Certain Categories of Natural Gas.

(a) GENERAL RULE.—

(1) DETERMINATION.—If any State or Federal agency makes any final determination which it is authorized to make under subsection (c) for purposes of—

(A) applying the definition of new natural gas under section 102(c);

(B) deciding if certain natural gas produced from the Outer Continental Shelf qualifies under section 102(d) for the new natural gas ceiling price;

(C) applying the definition of new, onshore production well under section 103(c);

(D) applying the definition of high-cost natural gas under section 107(c); or

(E) applying the definition of stripper well natural gas under section 108(b);

such determination shall be applicable under this Act for such purposes unless such determination is reversed under the provisions of subsection (b) or unless such State or Federal agency has waived its authority under the provisions of subsection (c).

(2) NOTICE TO COMMISSION.—Any Federal or State agency making a determination under paragraph (1) shall provide timely notice in writing of such determination to the Commission. Such notice

shall include such substantiation and be in such a manner as the Commission may, by rule, require.

(b) COMMISSION REVIEW.—

(1) AUTHORITY TO REVIEW AND REVERSE.—The Commission shall reverse any final State or Federal agency determination described in subsection (a) if—

(A) it makes a finding that such determination is not supported by substantial evidence in the record upon which such determination was made; and

(B) such preliminary finding and notice thereof under paragraph (3) is made within 45 days after the date on which the Commission received notice of such determination under subsection (a)(2) and the final such finding is made within 120 days after the date of the preliminary finding.

(2) REMAND ON BASIS OF COMMISSION INFORMATION.—If—

(A) the Commission finds that a State or Federal agency determination is not consistent with information contained in the public records of the Commission, and which is not part of the record upon which such determination was made; and

(B) such preliminary finding and notice thereof under paragraph (3) is made within 45 days after the date on which the Commission received notice of such determination under subsection (a)(2) and the final such finding is made within 120 days after the date of the preliminary finding,

it may remand the matter to such State or Federal agency for consideration of such information. If

such agency, after consideration of the information transmitted to it by the Commission, affirms its previous determination, such determination, as so affirmed, shall be subject to review in accordance with this subsection (other than this paragraph).

(3) NOTICE.—The Commission shall provide notice of any proposed finding under this subsection to the State or Federal agency which made such determination and those parties identified in the notice to the Commission of such determination.

(4) JUDICIAL REVIEW OF COMMISSION ACTIONS.—

(A) REMANDS.—Any party identified in the notice to the Commission of a determination by a State or Federal agency may obtain review of any final decision by the Commission to remand under paragraph (2) in the United States Court of Appeals for any circuit in which such party is located or has its principal place of business, or in the United States Court of Appeals for the District of Columbia circuit. The reviewing court shall reverse any such decision if it finds such decision is arbitrary or capricious.

(B) FINDINGS.—Any person aggrieved or adversely affected by a final finding of the Commisison under paragraph (1) may within 60 days thereafter file a petition for review of such finding in the United States Court of Appeals for any circuit in which the party involved in such determination is located or has its principal place of business, or in the United States Court of Appeals for the District of Columbia circuit. The reviewing court shall reverse any such finding of the Commission if the State or Federal agency determination involved is supported by substantial evidence.

(c) STATE AUTHORITY.—

(1) GENERAL RULE.—A Federal or State agency having regulatory jurisdiction with respect to the production of natural gas is authorized to make determinations referred to in subsection (a).

(2) WAIVER.—

(A) IN GENERAL.—Any Federal or State agency may, in whole or in part, waive its authority to make determinations referred to in subsection (a)(1) by entering into an agreement in accordance with subparagraph (B). If such agency executes such a waiver, the Commission shall, consistent with the agreement, make the determinations which would otherwise be made by such Federal or State agency until the earlier of—

(i) the expiration of the period specified in the agreement; or

(ii) the date such agency transmits to the Commission written notice that it terminates such waiver and assumes the authority to make determinations referred to in subsection (a)(1).

Any waiver, or termination of any waiver, shall not apply to any determination with respect to any petition therefor which is pending before such agency or the Commission (as the case may be) on the date on which such a waiver or revocation is made.

(B) AGREEMENTS.—Any waiver under subparagraph (A) may be made only by a written agreement between the Federal or State agency involved and the Commisison. Any such agreement shall set forth the terms and conditions applicable to such waiver.

(3) PROCEDURES APPLICABLE.—Determinations of a Federal or State agency referred to in subsection (a)(1) shall be made in accordance with the procedures generally applicable to such agency for the making of such determinations or comparable determinations under the provisions of Federal or State law, as the case may be, pursuant to which they exercise their regulatory jurisdiction. The Commission may prescribe the form and content of filings with a Federal or State agency in connection with determinations made under this section.

(4) JUDICIAL REVIEW.—Any such determination referred to in subsection (a)(1) made in accordance with procedures described in paragraph (3) shall not be subject to judicial review under any Federal or State law except as provided under subsection (b).

(d) EFFECT OF DETERMINATIONS.—For purposes of this Act—

(1) GENERAL RULE.—Any final determination referred to in subsection (a)(1) made by a Federal or State agency (or by the Commission under subsection (c)(2)) which relates to any natural gas and which is no longer subject to review by the Commission under this section or to judicial review shall thereafter be binding with respect to such natural gas. The preceding sentence shall not apply to any final determination—

(A) if in making such determination the Commission or such Federal or State agency relied on any untrue statement of a material fact; or

(B) if there was omitted a statement of material fact necessary in order to make the statements made not misleading, in light of the circumstances under which they were made, to the

Federal or State agency in making such final determination or to the Commission in reviewing such determination.

(2) APPLICATION OF TITLE 18.—Any untrue statement or omission of material fact to a Federal or State agency upon which the Commission relied shall be deemed to be statement or entry under section 1001 of title 18, United States Code.

(e) INTERIM COLLECTION OF MAXIMUM LAWFUL PRICE.—

(1) COLLECTION OF SECTION 109 PRICE.—

(A) GENERAL RULE.—Effective beginning on the first day of the first month beginning after the date of the enactment of this Act, a seller of natural gas which is produced from a new well may, in accordance with subparagraph (B), charge and collect the appropriate maximum lawful price under section 109 for any first sale of such natural gas.

(B) REQUIREMENTS.—A seller may charge and make collections under subparagraph (A) only in accordance with the following requirements:

(i) SWORN STATEMENT.—Before any such collection is made, the seller shall file with the Commission, and any Federal or State agency having authority to make determinations referred to in subsection (a)(1), a written sworn statement that such natural gas is produced from a new well and that such seller believes in good faith that such natural gas is eligible under this Act to be sold at a price not less than the appropriate maximum lawful price under section 109.

(ii) PETITION FOR DETERMINATION.—Within 90 days after the date of the enactment of this Act, the seller files a petition to such Federal or State agency for a determination under this section.

(iii) COLLECTION SUBJECT TO REFUND.—Any such collection made by the seller pending a determination under this section shall be collected subject to a condition of refund, with interest, in the event it is determined by such Federal or State agency that the applicable maximum lawful price is lower than that provided under section 109.

(2) ALTERNATE INTERIM COLLECTION AUTHORITY.—

(A) GENERAL RULE.—Promptly after the date of the enactment of this Act, the Commission shall, by rule or order, provide one or more methods under which a seller of natural gas may, in accordance with requirements established, and for such period as may be prescribed, under such rule or order, charge and collect for any first sale of such natural gas the maximum lawful price under title I for which a petition is filed for a determination under this section in any case in which such price exceeds the appropriate maximum lawful price under section 109.

(B) COLLECTION SUBJECT TO REFUND.—Any such collection made by the seller pending a determination under section 503 shall be collected subject to a condition of refund, with interest. Such refund with interest shall be paid, in accordance with the rule under subparagraph (A), unless it is determined under this Act that the applicable maximum lawful price is equal to or greater than that collected. In addition, such

seller shall comply with such requirements as the Commission shall prescribe in the applicable rule or order to provide adequate assurance that funds, to the extent attributable to a price in excess of the appropriate maximum lawful price under title I are available in the event of such refund.

(3) COLLECTION AFTER INITIAL DETERMINATION.—

(A) GENERAL RULE.—Effective beginning on the date of the notice of a determination under subsection (a)(2), a seller of natural gas covered by such determination may, in accordance with subparagraph (B), charge and collect the appropriate maximum lawful price applicable under such determination.

(B) REQUIREMENTS.—A seller may charge and make collections under subparagraph (A) if such collection is subject to conditions prescribed by the Commission to assure refund, with interest, in the event it is determined under this Act that the applicable maximum lawful price is lower than that provided under section 109.

3. Section 601 of the Natural Gas Policy Act, as codified at 15 U.S.C. § 3431, provides:

Sec. 601. Coordination with the Natural Gas Act.

(a) JURISDICTION OF THE COMMISSION UNDER THE NATURAL GAS ACT.—

(1) SALES.—

(A) NATURAL GAS NOT COMMITTED OR DEDICATED.—For purposes of section 1(b) of the Natural Gas Act, effective on the first day of the

first month beginning after the date of the enactment of this Act, the provisions of the Natural Gas Act and the jurisdiction of the Commission under such Act shall not apply to natural gas which was not committed or dedicated to interstate commerce as of the day before the date of enactment of this Act solely by reason of any first sale of such natural gas.

(B) COMMITTED OR DEDICATED NATURAL GAS.—Effective beginning on the first day of the first month beginning after the date of the enactment of this Act, for purposes of section 1(b) of the Natural Gas Act, the provisions of such Act and the jurisdiction of the Commission under such Act shall not apply solely by reason of any first sale of natural gas which is committed or dedicated to interstate commerce as of the day before the date of the enactment of this Act and which is—

(i) high-cost natural gas (as defined in section 107(c) (1), (2), (3), or (4) of this Act);

(ii) new natural gas (as defined in section 102(c) of this Act); or

(iii) natural gas produced from any new, onshore production well (as defined in section 103(c) of this Act).

(C) AUTHORIZED SALES OR ASSIGNMENTS.—For purposes of section 1(b) of the Natural Gas Act, the provisions of the Natural Gas Act and the jurisdiction of the Commission under such Act shall not apply by reason of any sale of natural gas—

(i) authorized under section 302(a) or 311(b); or

(ii) pursuant to any assigned authorized under section 312(a).

(D) NATURAL-GAS COMPANY.—For purposes of the Natural Gas Act, the term "natural-gas company" (as defined in section 2(6) of such Act) shall not include any person by reason of, or with respect to, any sale of natural gas if the provisions of the Natural Gas Act and the jurisdiction of the Commission do not apply to such sale solely by reason of subparagraph (A), (B), or (C) of this paragraph.

(E) ALASKAN NATURAL GAS.—Subparagraph (B) (ii) and (iii) shall not apply with respect to natural gas produced from the Prudhoe Bay unit of Alaska and transported through the transportation system approved under the Alaska Natural Gas Transportation Act of 1976.

(2) TRANSPORTATION.—

(A) JURISDICTION OF THE COMMISSION.—For purposes of section 1(b) of the Natural Gas Act the provisions of such Act and the jurisdiction of the Commission under such Act shall not apply to any transportation in interstate commerce of natural gas if such transportation is—

(i) pursuant to any order under section 302(c) or section 303 (b), (c), (d), or (h) of this Act; or

(ii) authorized by the Commission under section 311(a) of this Act.

(B) NATURAL-GAS COMPANY.—For purposes of the Natural Gas Act, the term "natural-gas company" (as defined in section 2(6) of such Act) shall not include any person by reason of, or with respect to, any transportation of natural

gas if the provisions of the Natural Gas Act and the jurisdiction of the Commission under the Natural Gas Act do not apply to such transportation by reason of subparagraph (A) of this paragraph.

(b) CHARGES DEEMED JUST AND REASONABLE.—

(1) SALES.—

(A) FIRST SALES.—Subject to paragraph (4), for purposes of sections 4 and 5 of the Natural Gas Act, any amount paid in any first sale of natural gas shall be deemed to be just and reasonable if—

(i) such amount does not exceed the applicable maximum lawful price established under title I of this Act; or

(ii) there is no applicable maximum lawful price solely by reason of the elimination of price controls pursuant to subtitle B of title I of this Act.

(B) EMERGENCY SALES.—For purposes of sections 4 and 5 of the Natural Gas Act, any amount paid in any sale authorized under section 302(a) shall be deemed to be just and reasonable if such amount does not exceed the fair and equitable price established under such section and applicable to such sale.

(C) SALES BY INTRASTATE PIPELINES.—For purposes of section 4 and 5 of the Natural Gas Act, any amount paid in any sale authorized by the Commission under section 311(b) shall be deemed to be just and reasonable if such amount does not exceed the fair and equitable price established by the Commission and applicable to such sale.

(D) ASSIGNMENTS.—For purposes of sections 4 and 5 of the Natual Gas Act, any amount paid pursuant to the terms of any contract with respect to that portion of which the Commission has authorized an assignment authorized under section 312(a) shall be deemed to be just and reasonable if such amount does not exceed the applicable maximum lawful price established under title I of this Act.

(E) AFFILIATED ENTITIES LIMITATION.—For purposes of paragraph (1), in the case of any first sale between any interstate pipeline and any affiliate of such pipeline, any amount paid in any first sale shall be deemed to be just and reasonable if, in addition to saitsfying the requirements of such paragraph, such amount does not exceed the amount paid in comparable first sales between persons not affiliated with such interstate pipeline.

(2) OTHER CHARGES.—

(A) ALLOCATION.—For purposes of sections 4 and 5 of the Natural Gas Act, any amount paid by any interstate pipeline for transportation, storage, delivery or other services provided pursuant to any order under section 303 (b), (c), or (d) of this Act shall be deemed to be just and reasonable if such amount is prescribed by the President under section 303(h)(1).

(B) TRANSPORTATION.—For purposes of sections 4 and 5 of the Natural Gas Act, any amount paid by any interstate pipeline for any transportation authorized by the Commission under section 311(a) of this Act shall be deemed to be just and reasonable if such amount does not exceed that approved by the Commission under such section.

(c) GUARANTEED PASSTHROUGH.—

(1) CERTIFICATE MAY NOT BE DENIED BASED UPON PRICE.—The Commission may not deny, or condition the grant of, any certificate under section 7 of the Natural Gas Act based upon the amount paid in any sale of natural gas, if such amount is deemed to be just and reasonable under subsection (b) of this section.

(2) RECOVERY OF JUST AND REASONABLE PRICES PAID.—For purposes of sections 4 and 5 of the Natural Gas Act, the Commission may not deny any interstate pipeline recovery of any amount paid with respect to any purchase of natural gas if—

(A) under subsection (b) of this section, such amount is deemed to be just and reasonable for purposes of sections 4 and 5 of such Act, and

(B) such recovery is not inconsistent with any requirement of any rule under section 201 (including any amendment under section 202),

except to the extent the Commission determines that the amount paid was excessive due to fraud, abuse, or similar grounds.

4. Section 4 of the Natural Gas Act of 1938, as amended and codified at 15 U.S.C. § 717c, provides:

§ 717c. Rates and charges

(a) Just and reasonable rates and charges. All rates and charges made, demanded, or received by any natural-gas company for or in connection with the transportation or sale of natural gas subject to the jurisdiction of the Commission, and all rules and regulations affecting or pertaining to such rates or charges, shall be just and reasonable, and any such rate or charge that is not just and reasonable is hereby declared to be unlawful.

(b) Undue preferences and unreasonable rates and charges prohibited. No natural-gas company shall, with respect to any transportation or sale of natural gas subject to the jurisdiction of the Commission, (1) make or grant any undue preference or advantage to any person or subject any person to any undue prejudice or disadvantage, or (2) maintain any unreasonable difference in rates, charges, service, facilities, or in any other respect, either as between localities or as between classes of service.

(c) Filing of rates and charges with Commission; public inspection of schedules. Under such rules and regulations as the Commission may prescribe, every natural-gas company shall file with the Commission, within such time (not less than sixty days from the date this Act takes effect) and in such form as the Commission may designate, and shall keep open in convenient form and place for public inspection, schedules showing all rates and charges for any transportation or sale subject to the jurisdiction of the Commission, and the classifications, practices, and regulations affecting such rates and charges, together with all contracts which in any manner affect or relate to such rates, charges, classifications, and services.

(d) Changes in rates and charges; notice to Commission. Unless the Commission otherwise orders, no change shall be made by any natural-gas company in any such rate, charge, classification, or service, or in any rule, regulation, or contract relating thereto, except after thirty days' notice to the Commission and to the public. Such notice shall be given by filing with the Commission and keeping open for public inspection new schedules stating plainly the change or changes to be made in the schedule or schedules then in force and the time when the change or changes will go into effect. The Commission, for good cause shown, may allow changes to take effect without requiring the thirty days' notice herein provided for by

an order specifying the changes so to be made and the time when they shall take effect and the manner in which they shall be filed and published.

(e) Authority of Commission to hold hearings concerning new schedule of rates. Whenever any such new schedule is filed the Commission shall have authority, either upon complaint of any State, municipality, State commission, or gas distributing company, or upon its own initiative without complaint, at once, and if it so orders, without answer or formal pleading by the natural-gas company, but upon reasonable notice, to enter upon a hearing concerning the lawfulness of such rate, charge, classification, or service; and, pending such hearing and the decision thereon, the Commission, upon filing with such schedules and delivering to the natural-gas company affected thereby a statement in writing of its reasons for such suspension, may suspend the operation of such schedule and defer the use of such rate, charge, classification, or service, but not for a longer period than five months beyond the time when it would otherwise go into effect; and after full hearings, either completed before or after the rate, charge, classification, or service goes into effect, the Commission may make such orders with reference thereto as would be proper in a proceeding initiated after it had become effective. If the proceeding has not been concluded and an order made at the expiration of the suspension period, on motion of the natural-gas company making the filing, the proposed change of rate, charge, classification, or service shall go into effect. Where increased rates or charges are thus made effective, the Commission may, by order, require the natural-gas company to furnish a bond, to be approved by the Commission, to refund any amounts ordered by the Commission, to keep accurate accounts in detail of all amounts received by reason of such increase, specifying by whom and in whose behalf such amounts were paid, and, upon completion of the hearing and decision, to order such natural-gas company to refund, with interest, the por-

tion of such increased rates or charges by its decision found not justified. At any hearing involving a rate or charge sought to be increased, the burden of proof to show that the increased rate or charge is just and reasonable shall be upon the natural-gas company, and the Commission shall give to the hearing and decision of such questions preference over other questions pending before it and decide the same as speedily as possible.

(June 21, 1938, ch 556, § 4, 52 Stat. 822; May 21, 1962, P. L. 87-454, 76 Stat. 72.)

5. Section 7(c) of the Natural Gas Act of 1938, as amended and codified at 15 U.S.C. § 717f(c), provides:

(c) Certificate of public convenience and necessity. (1) (A) No natural-gas company or person which will be a natural-gas company upon completion of any proposed construction or extension shall engage in the transportation or sale of natural gas, subject to the jurisdiction of the Commission, or undertake the construction or extension of any facilities therefor, or acquire or operate any such facilities or extensions thereof, unless there is in force with respect to such natural-gas company a certificate of public convenience and necessity issued by the Commission authorizing such acts or operations: Provided, however, That if any such natural-gas company or predecessor in interest was bona fide engaged in transportation or sale of natural gas, subject to the jurisdiction of the Commission, on the effective date of this amendatory Act, over the route or routes or within the area for which application is made and has so operated since that time, the Commission shall issue such certificate without requiring further proof that public convenience and necessity will be served by such operation, and without further proceedings, if application for such certificate is made to the Commission within ninety days after the effective date of this amendatory Act. Pending the determination of any such application, the continuance of such operation shall be lawful.

(B) In all other cases the Commission shall set the matter for hearing and shall give such reasonable notice of the hearing thereon to all interested persons as in its judgment may be necessary under rules and regulations to be prescribed by the Commission; and the application shall be decided in accordance with the procedure provided in subsection (e) of this section and such certificate shall be issued or denied accordingly: Provided, however, That the Commission may issue a temporary certificate in cases of emergency, to assure maintenance of adequate service or to serve particular customers, without notice or hearing, pending the determination of an application for a certificate, and may by regulation exempt from the requirements of this section temporary acts or operations for which the issuance of a certificate will not be required in the public interest.

(2) The Commission may issue a certificate of public convenience and necessity to a natural-gas company for the transportation in interstate commerce of natural gas used by any person for one or more high-priority uses, as defined, by rule, by the Commission, in the case of—

(A) natural gas sold by the producer to such person; and

(B) natural gas produced by such person.

APPENDIX B

ORDER NO. 451 INCREASES IN THE VINTAGED CEILING PRICES THAT CONGRESS ESTABLISHED FOR FLOWING OLD GAS AS OF DECEMBER, 1986 (WHEN ORDER NO. 451-A ISSUED)

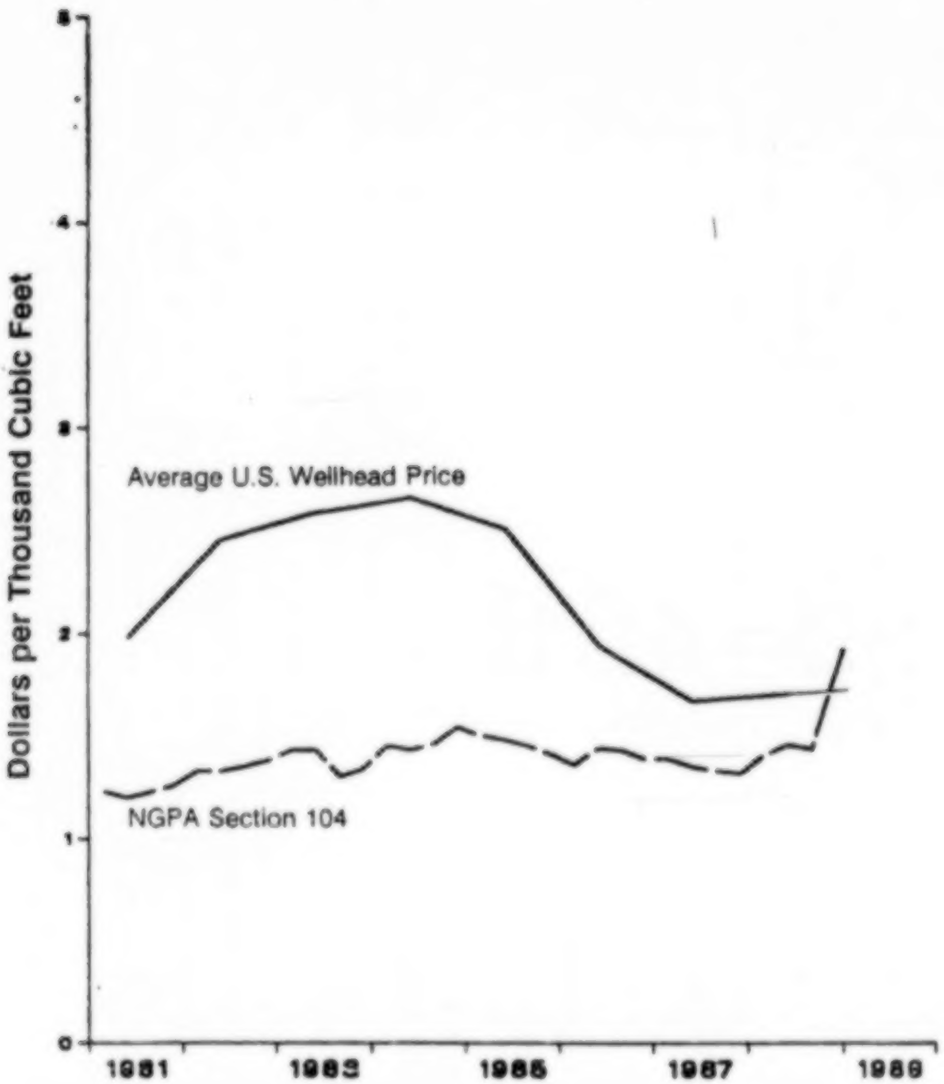
Old Gas Vintages	Congressionally Mandated Ceiling Prices for Section 104 and Section 106(a) Gas	Order No. 451 Ceiling Price	Increase Worked by Order No. 451	
	Per MMBtu	Per MMBtu	Dollars	%
Post-1974 Gas-				
All Producers	$2.609	$2.609	0	0
1973-1974 Biennium Gas				
Small Producers	$2.206	$2.609	$0.403	18.3%
Large Producers	$1.685	$2.609	$0.924	54.8%
Interstate Roll-over Gas	$0.970	$2.609	$1.639	168.9%
Replacement contract gas				
Small Producers	$1.237	$2.609	$1.372	110.9%
Large Producers	$0.951	$2.609	$1.658	174.3%
Flowing Gas				
Small Producers	$0.627	$2.609	$1.980	316.1%
Large Producers	$0.527	$2.609	$2.082	395.0%

Old Gas Vintages	Congressionally Mandated Ceiling Prices for Section 104 and Section 106(a) Gas	Order No. 451 Ceiling Price	Increase Worked by Order No. 451	
	Per MMBtu	Per MMBtu	Dollars	%
Certain Permian Basin Gas				
Small Producers	$0.737	$2.609	$1.872	254.0%
Large Producers	$0.653	$2.609	$1.956	299.5%
Certain Rocky Mountain Gas				
Small Producers	$0.737	$2.609	$1.872	254.0%
Large Producers	$0.627	$2.609	$1.982	316.1%
Certain Appalachian Gas				
With North Subarea Contracts	$0.596	$2.609	$2.013	337.7%
Other Contracts	$0.551	$2.609	$2.058	373.5%
Minimum Rate Cas [1]				
All Producers	$0.327	$2.609	$2.282	697.8%

[1] Prices for minimum rate gas are expressed in terms of dollars per Mcf, rather than MMBtu. This table assumes a 1:1 conversion from Mcf to MMBtu for minimum rate gas.

APPENDIX C

Average U.S. Wellhead Prices Compared to Section 104 Prices. 1981-1988



Sources: EIA, *Natural Gas Monthly*.

Natural Gas Price Controls: Hearing on H.R. 1595 before the House Comm. on Energy and Commerce, 101st Cong., 1st Sess. 27 (1989) (attachment to testimony of J. Allen Wampler, Assistant Secretary for Fossil Energy, U.S. Department of Energy).